CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 84.

GUSTAVE A. JAHN ET AL.

vs.

STEAMSHIP "FOLMINA," WILLIAM VAN EYKEN, CLAIMANT.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED MAY 14, 1907.

(20,715.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 10. 1908

1 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Townsend, and Coxe, Circuit Judges.

GUSTAVE A. JAHN and Another, Libellants-Appellants,
vs.
S. S. "FOLMINA;" WILLIAM VAN EYKEN, Claimant-Appellee.

This cause came here upon appeal from a decree of the district court, Eastern District of New York, dismissing a libel. Upon the hearing of the appeal questions or propositions of law arose, concerning which this court desires the instruction of the Supreme Court for its proper decision.

Statement of Facts.

The facts upon which the questions arise are as follows.

The S. S. "Folmina" sailed from Kobe, Japan for New York with a large shipment of rice on board, in No. 3 hold under a bill of lading which exempted the carrier from "The act of God * * * loss or damage from * * * explosion, heat, or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, decay, vermin, rain spray."

The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was
2 downward from the first six tiers of bags to the bottom of the hold which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

A majority of the court are satisfied that the damage was caused by sea-water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The Folmina was a steel steamship of the highest class in Lloyds' Register. Before starting for Japan she was in drydock at New York and was there surveyed by Lloyds' surveyor. Some time before she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder-quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants

and their underwriters and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea-water,—if that be considered evidence) was found that there had been leaks in any part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part
3 of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy.

Question Certified.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are:

1. "Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

2. Whether the ship is relieved from liability in consequence of said exception?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, establishing Courts of Appeal-, the foregoing question of law is by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court.

New York, May 7th 1907.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge.

4 United States Circuit Court of Appeals, Second Circuit.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 7th day of May 1907, and by direction of the Judges of said Court, the certificate is by me forwarded to the Supreme Court of the United States.

Dated May 7, 1907.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

5 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Gustave A. Jahn and ano., Lib'l'ts-Appellants, *vs.* S. S. "Folmina", William Van Eyken, Claimant-Appellee. Certificate. United States Circuit Court of Appeals, Second Circuit. Filed May 7, 1907. William Parkin, Clerk.

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7

FILED.
JAN 19 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 84.

GUSTAVE A. JAHN ET AL.,
Libellants.

vs.

STEAMSHIP "FOLMINA," WILLIAM VAN EYKEN,
Claimant.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF GUSTAVE A. JAHN & CO. CARGO OWNERS.

WALLACE, BUTLER & BROWN,
Proctors for Libellants.

FREDERICK M. BROWN,
Advocate.

[illegible] PRESS AND BINDERY COMPANY, 100 WILLIAM ST., N. Y.

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Supreme Court of the United States.

GUSTAVE A. JAHN *et al.*, *Libellants,* AGAINST The STEAMSHIP FOLMINA, William Van Eyken, *Claimant.*	October Term, 1908. No. 84.

BRIEF ON BEHALF OF GUSTAVE A. JAHN & CO., CARGO OWNERS.

Gustave A. Jahn & Co., as owners of a shipment of rice which was carried in No. 3 hold of the steamer *Folmina* from Japan to New York, libelled the steamer in the District Court of the United States for the Eastern District of New York, to recover damages in respect of the serious injury to their rice by wetting, which was disclosed upon the discharge of the steamer.

Although the cause of the damage was wholly unexplained by the carrier, and although no severe weather or other casualty was shown by the proofs, Judge Thomas ordered a dismissal of the libel apparently on the ground that the evidence of the general good condition of the *Folmina* was sufficient to warrant the inference that the loss was due to a sea peril. 143 Fed. Rep. 636.

Upon an appeal by the cargo owners to the Circuit Court of Appeals for the Second Circuit, the Judges of that Court did not agree concerning the cause of the damage or concerning the legal effect of unexplained sea water damage, of which character a majority of the Judges of that Court believed the damage to be: 153 Federal Reporter 364.

The Circuit Court of Appeals for the Second Circuit thereupon certified to this Court the following statement of facts and questions of law:

> "The S. S. "Folmina" sailed from Kobe, " Japan, for New York with a large shipment " of rice on board, in No. 3 hold under a bill of " lading which exempted the carrier from " 'The act of God * * * loss or damage " from * * * explosion, heat, or fire on " board * * * risk of craft or hulk or " trans-shipment and all and every the dan- " gers and accidents of the seas, rivers and " canals and of navigation of whatever nature " or kind.' It further provided that the ship " 'is not liable for * * * sweat, rust, de- " cay, vermin, rain, spray.'
>
> "The rice was in good order when put on " board, but when discharged in New York a " large part of it stowed on the starboard side " of the hold was found damaged. The area " of injury was downward from the first six " tiers of bags to the bottom of the hold " which was dry, forward from about the " after end of the hatchway nearly to the " bulkhead, and inboard about three or four " bags. The damage was caused by water " and consequent heat.
>
> " A majority of the court are satisfied that " the damage was caused by sea water and " that it was not shown that the vessel en- " countered sufficient stress of weather to " warrant the inference that it came in be- " cause of the action of external causes. " There was no evidence tending to show any " negligence, fault or error on the part of the " ship's officers or crew; the cargo was well " stowed and ventilated.
>
> " The Folmina was a steel steamship of " the highest class in Lloyds' Register. Be-

" fore starting for Japan she was in dry dock " at New York and was there surveyed by " Lloyds' surveyor. Some time before she " had been in dry dock at Cardiff, where " some repairs were made to the rudder, " rudder-quadrant and a ventilator. The " master testified to the general good condi- " tion of the steamer at the time she sailed " from Kobe.

" During and after the delivery of the " cargo, the main deck, the between-deck, the " pipes leading to or connected with No. 3 " hold and the shell plating in the wing of " No. 3 hold were carefully examined by " the officers of the ship, by surveyors rep- " resenting libellants and their underwriters " and it was afterwards examined by com- " petent and experienced surveyors represent- " ing both parties. The decks, hull, side- " plating and rivets of the ship were found to " be sound, intact and free from leaks. No " evidence (other than the mere circumstance " that the damage was by sea-water—if that " be considered evidence) was found that " there had been leaks in any part of the " frame, structure, side plating, riveting, " pipes or appurtenances of the ship, through " which water might have reached that part " of No. 3 hold where the damage was done. " No adequate means of access of sea-water " were found, nor any defect in the steamer " which then appeared to be seaworthy.

Questions Certified.

" Upon the facts above set forth, the ques- " tions of law concerning which this Court " desires the instruction of the Supreme " Court are:

1. " Whether damage to the cargo of an " apparently seaworthy ship through the un- " explained admission of sea water, in the " absence of any proof of fault on the part of " the officers or crew of the ship, is of itself a " sea peril within the meaning of the bill of " lading exception above quoted?

2. " Whether the ship is relieved from lia- " bility in consequence of said exception?"

It should be noted that there are only three *facts actually found* by the Circuit Court of Appeals, namely:

(1) That libellants' rice suffered injury while in the carrier's custody;
(2) That the injury consisted of sea water damage; and
(3) That the stowage and ventilation of the rice on board the steamer were good.

The Court also certified that there was *absence of proof* in the following respects:

(1) That there was no sufficient proof of stress of weather to warrant the inference that sea water entered owing to causes external to the ship;
(2) That there was no proof of any faults or negligence on the part of the crew of the steamer.

The Court has not found either seaworthiness or unseaworthiness on the part of the *Folmina*. What it has found is that there was an *appearance* of seaworthiness. It has found:

(1) That *the master testified* to the good general condition of the ship upon leaving Kobe, Japan;
(2) That in the port of arrival during and after the discharge of cargo, there was a careful examination of the ship resulting in a failure to discover any defect;
(3) That at the time of this examination in the port of discharge, there were no signs indicating the previous existence of leaks.

The *Folmina*, in view of the bill of lading which had been issued, bore toward her cargo the obligations of a common carrier.

The Commander-in-Chief, 1 Wall. 43, 51.
Pope v. *Nickerson*, 3 Story, 465, 473.
The Minnie Hammond, 9 Wall. 435, 459.
The Delaware, 14 Wall. 579, 596.

Judging from its original opinion (*The Folmina*, 153 Fed. 364), the purpose of the Circuit Court of Appeals in submitting the foregoing questions to this Court is to obtain an adjudication as to

(1) Whether the carrier of goods shipped under a bill of lading containing the usual sea peril exception is obligated, when he discharges goods damaged by sea water while within his custody, to make some affirmative showing or explanation from which it is apparent or inferable how sea water reached the goods, and that this happened owing to heavy weather or to some marine casualty, or to some other specific cause that is amongst those recognized as perils of the sea, or

(2) Whether, on the other hand, the mere fact that the goods were damaged by sea water while in the carrier's custody, raises a presumption that the goods were damaged by one of the causes just mentioned to the extent of imposing upon the shipper, if he is to recover, the burden of showing that the sea water reached the goods in question owing to some different cause.

The opposing views are well stated in the decision in the case of *The Patria*, 132 Fed., 972, and in the brief on behalf of the steamer *Folmina* which was filed in the Circuit Court of Appeals.

In *The Patria*, the Court said:

> " It is, no doubt, the rule, as appellant con-
> " tends, that, when the damage is manifestly
> " of the sort excepted, the ship is under no
> " obligation to show the promoting cause.
> " To illustrate: If the exception is ' damage
> " caused by peril of the sea,' and the cargo is
> " landed drenched with salt water, it will be
> " *for the ship to show that the salt water*
> " *found access to the cargo through a peril of*
> " *the sea;* but, if the exception is ' damage
> " by breakage,' and the article arrives broken,
> " the ship is not required to show how it got
> " broken, although the libellant may show
> " that negligence of those on the ship, or of

> " those who stowed her or discharged her,
> " caused the break, and, showing that, may
> " recover."

In the brief for the Folmina, on the other hand, it was said:

> " The exception " (of perils of the sea)
> " should relieve the ship unless the libellant
> " has shown by a preponderance of evidence
> " that the admission of sea water was due to
> " some negligence on the part of the claimant.
> " The affirmative of this proposition necessar-
> " ily rests on the libellant. The burden must
> " be supported by the production of proof.
> " It was, therefore, a part of the case of the
> " libellants to prove that the admission of sea
> " water was the result of some negligence
> " which should deprive the claimant of the
> " benefit of the exception " (pp. 83, 84).
>
> " Such a damage would be, *prima facie*, a
> " peril of the sea and would put upon the
> " owner of the goods the burden of proving
> " that it had been caused by negligence " (pp. 69, 70).

I.

The decision of this Court in the case of the G. R. Booth is controlling.

It should be stated at the outset that, in our view, the questions submitted to this Court for its decision have in their essential features already been decided by this Court in the case of *The G. R. Booth*, 171 U. S. 450.

The only differences between that case and the present case are, it is submitted, differences that make the owner of cargo on the *Folmina* more clearly entitled to redress than the owner of cargo on the *G. R. Booth*.

Both cases involve sea-water damage to cargo shipped under a bill of lading containing the usual

"sea peril" exception. In both cases, the record was bare of any proof of fault on the part of the carrier or his crew. In both cases, there was no affirmative indication of any antecedent defect or unseaworthiness on the part of the vessel. In both cases, the carrier's defense was that he was free from negligence, that he furnished a seaworthy vessel and that the entrance of sea water into such a vessel and without fault, amounts to a sea peril within the meaning of the bill of lading exception, and that under that exception, the carrier is entitled to exoneration.

The differences between the two cases are:

1. That in the case of the *G. R. Booth* the carrier *fully explained* the entrance of the sea water by showing that in a compartment adjacent to that in which libellants' sugar was stowed, a case of detonators exploded, making an aperture in the ship's side, through which sea water entered and damaged libellants' cargo. In the present case, on the other hand, the carrier either will not or cannot explain how sea water entered the *Folmina;* the record does not show whether he will not or cannot.

2. In the *G. R. Booth*, the Circuit Court of Appeals certified to this Court as a fact that that steamer was *actually seaworthy.* In the present case, it has gone no further than to certify that there was an *appearance* of seaworthiness in the *Folmina*, and that competent surveyors could not discover any defect.

3. In the *G. R. Booth*, the facts certified by the Circuit Court of Appeals excluded the hypothesis of negligence on the part of the carrier or his crew. In the present case, the Circuit Court of Appeals has only certified that the record contains *no evidence* showing negligence or fault on the part of the *Folmina's* crew.

No other point of difference between the two cases has been discovered.

Clearly, each one of the foregoing points of difference is one favorable to the libellants against the *Folmina* rather than to the libellants against the *G. R. Booth.*

In the *G. R. Booth*, this Court, in a carefully considered opinion by Mr. Justice Gray, answered the question certified by the Circuit Court of Appeals favorably to the cargo owners; *a fortiori* should this Court answer the present questions favorably to the cargo owners.

It is true that in the *G. R. Booth* the reasoning of this Court turns upon the proper application of the maxim *causa proxima non remota spectatur.*

The sea water which damaged the sugar on board the *G. R. Booth* was not regarded by this Court as the proximate cause because it was not the efficient cause of the damage; it was merely the weapon by means of which, the explosion inflicted its injury.

> "The damage to the sugar," said Mr. Justice Gray, "was an effect which proceeded inevitably and from absolute necessity from the explosion and must therefore be ascribed to that cause. * * * The inflow of the water seeking a level by the mere force of gravitation was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion" (171 U. S. 460).

A further illustration of the same principle is found in *The Thrunscoe* [1897] Prob. 301.

It follows equally clearly that sea water itself cannot be regarded as the efficient cause of the damage sustained by the rice on board the *Folmina;* that cause must be sought in those conditions or events which caused or permitted the *entrance* of sea water.

Surely the *Folmina* cannot justly argue that sea water was the efficient, the proximate cause of the cargo damage, because no other cause of that damage has been disclosed. For it is just as certain in the case

of the *Folmina* as in the case of the *Booth*, that there must have been an efficient agency or cause, permitting the sea water to enter. So long as that efficient cause remains undisclosed, the Courts cannot know whether the damage comes within the scope of the sea peril exception or not.

As it is the obligation of the carrier, upon fundamental principles, to bring the case within some contractual exception or statutory exemption from liability in order to exonerate himself, it follows that the *Folmina* must be liable and the questions certified by the Circuit Court of Appeals must be answered in the negative.

II.

Possible explanations of the entrance of sea water.

It may be useful to make a list of the different classes of hypotheses which might explain the entrance of sea water into an apparently seaworthy ship, where the proofs themselves offer no explanation.

The first four classes enumerated below are those in which the carrier would be liable; the last two are those in which the carrier would be under no legal liability:

1. Where sea water has entered the ship through some actual (but here undiscovered) structural defect existing at the inception of the voyage, with or without fault on the part of the shipowner or arising during the voyage (such as rust, ordinary wear, etc.), not due to a cause amounting to a sea peril.

The Caledonia, 157 U. S. 124.
The Carib Prince, 170 U. S. 655.
The Edwin I. Morrison, 153 U. S. 199.

2. Where sea water has entered through some mishap within the ship, not to have been anticipated and not due to the fault of the carrier or his servants: such as the chemical action upon the vessel's hull of cargo other than libellants' cargo, or such as the boring of some (possibly microscopic) animal or organism, resulting, in either case, in a very small aperture below the water line. The circumstances in the *G. R. Booth* would belong to the present class, except that there the cause of the admission of water would necessarily have been discovered by such an examination as was made of the *Folmina*.

3. Where sea water has entered through some fault on the part of the crew (here not disclosed in the proofs) in stowing or caring for cargo.

Knott v. *Botany Mills*, 179 U. S. 69.
The Germanic, 196 U. S. 589.

4. Where sea water has entered through some fault or error in navigation or in the management of the vessel; the owner not having used due diligence to make the vessel seaworthy and to supply a competent crew.

Int. Nav. Co. v. *Farr & Bailey Mfg. Co.* 181 U. S. 218.
The Southwark, 191 U. S. 1.
The Cygnet, 126 Fed. 742, 745.

5. Where sea water has entered through a marine casualty, amounting to a peril of the sea, such casualty here having escaped the notice of the crew and left no evidences behind.

6. Where sea water has entered through some fault or error in navigation, or in the management of the vessel, notwithstanding the use by the shipowner of due diligence to make the vessel seaworthy, and to supply a competent crew.

The Wildcroft, 201 U. S. 378.
The Silvia, 171 U. S. 462.

The damage to the rice involved in the present case may fall within any one of the first five of the foregoing classes. The possibility of a case under the sixth class is eliminated from consideration by the statement of facts and questions of law submitted by the Circuit Court of Appeals.

It is idle to argue that considering each class separately, it seems somewhat improbable (if all the witnesses were telling the truth) that the entrance of sea water into the Folmina presents a case in that particular class: for no other hypotheses than those above suggested can, it is believed, be presented to account for the entrance of sea water into the Folmina. And yet sea water *did* enter.

The hypothesis of sweat damage which was at one time urged by the carrier, had for its principal support the difficulty of explaining the entrance of sea water into the Folmina. But the sweat hypothesis, in turn, was even more difficult to accept upon the testimony of the chemical experts and others. It has, therefore, been definitely rejected and is not now before this Court.

The question submitted to this Court is essentially whether in the absence of better proof than this record presents, the hypothesis represented by class 5 (*supra*) ought to be accepted (as the carrier contends) and the preceding four hypotheses rejected.

It is respectfully submitted that the answer to this question is to be found in the same considerations as those upon which the insurer's liability of a common carrier, as a matter of historical development, was founded.

III.

Carriers should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration.

> "The burden of proof lies on the carrier, "and nothing short of clear proof leaving no "reasonable doubt for controversy should be "permitted to discharge him from duties "which the law has annexed to his employ-"ment."
>
> *The Mohler*, 21 Wall. 230, 233.

A rule so well established should not be changed except by legislative enactment.

> *The Propellor Niagara* v. *Cordes*, 21 How. 7, 25.

When goods are entrusted to a carrier, the owner of the goods loses supervision over them; he is dependent entirely upon the carrier and the carrier's servants for any explanation that may be given as to the causes of loss or damage.

There are many carriers, no doubt, whose desire to avoid liability would in no event tempt them to compromise with their consciences. But there is unfortunately a numerous class of carriers who are only too prone to exaggerate and distort the facts in order to avoid legal liability, where there is virtually no possibility of exposure.

The legal rules defining a common carrier's liability have been adopted in order to give the cargo owner necessary protection against the latter class of carriers.

In the opinion delivered by Mr. Justice Brown in the case of *The Caledonia*, 157 U. S. 124, 144, it was said:

> "From reasons of public policy, and from "the fact that the carrier and his servants

"are solely entrusted with the custody of "goods carried, and the owner has no means "of protecting himself against their embez- "zlement or negligence, the law has imposed "upon the carrier the stringent liability of an "insurer. As was said by Lord Holt, in "*Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918:

'This is a politic establishment contrived 'by the policy of the law, for the safety of 'all persons, the necessity of whose affairs 'obliges them to trust these sorts of per- 'sons, that they may be safe in their 'ways of dealing; for else these carriers 'might have an opportunity for undoing all 'persons that had any dealings with them, 'by combining with thieves, etc., and yet 'doing it in such a clandestine manner as 'would not be possible to be discovered. 'And this is the reason the law is founded 'upon in that point.' "

The fundamental danger to be guarded against by the courts in dealing with carriers was well stated by Lord Mansfield in *Forward* v. *Pittard* (1785), 1 Durnford & East, 27:

"By the nature of his contract he" (the car- rier) "is liable for all due care and diligence; "and for any negligence he is suable on his "contract. But there is something more by "the custom of the realm, that is, by the "common law; a carrier is in the nature of "an insurer. It is laid down that he is liable "for every accident, except by the act of God "or the King's enemies. Now what is the "act of God? I consider it to mean some- "thing in opposition to the act of man, for "everything is the act of God that happens "by his permission; everything by his knowl- "edge. But *to prevent litigation, collusion "and the necessity of going into circum- "stances impossible to be unravelled; the law "presumes against the carrier*, unless he "shows it was done by the King's enemies, "or by such act as could not happen by the "intervention of man; as storms, lightnings "and tempests.

"If an armed force come to rob the carrier

"of his goods, he is liable; and a reason is "given in the books which is a bad one, viz., "that he ought to have sufficient force to "repel it; but that would be impossible in "some cases, for instance, the riots in the "year 1780. The true reason is for fear it "may give room for collusion that the mas- "ter may contrive to be robbed on purpose "and share the spoil."

Best, *C. J.*, in *Riley* v. *Horne*, 5 Bing. 217, says:

"When goods are delivered to the carrier, "they are usually no longer in the eye of the "owner. He seldom follows or sends any "servant with them to their place of destina- "tion. If they should be lost or injured by "the grossest negligence of the carrier or his "servants, or stolen by them or by thieves in "collusion with them, the owner would be "unable to prove either of these causes of "loss. His witnesses must be the carrier's "servants, and they, knowing that they could "not be contradicted, would excuse their "masters and themselves." * * *

"From his liability as an insurer the car- "rier is only to be relieved by two things, "both *so well known to all the country* when "they happen, *that no person would be so "rash as to attempt to prove that they had "happened when they had not*—namely, the "act of God and the King's enemies."

Just as common carriers, aside from contractual stipulations, are liable to cargo owners as insurers, except in respect of losses due to acts of God or of the public enemy and in the event of loss, are required to show *affirmatively* that the loss was due to one of the two latter causes in order to escape liability; so also where the contract of carriage contains stipulations exonerating the carrier from liability in certain specific cases, the carrier should not be permitted to take advantage of these exceptions unless he clearly explains the causes of loss, so as to show with reasonable certainty that such cause is excepted by the contract. It is *only where a full*

explanation is given by the carrier that the cargo owner has any opportunity of disputing the carrier's theory of loss and of protecting himself against imposition.

If, for instance, the carrier points out the part of his vessel where sea water has effected an entrance, the vessel will be condemned for unseaworthiness in the absence of evidence that that very part of the vessel was examined at the beginning of the voyage and found to be in good condition.

The Edwin I. Morrison, 153 U. S. 214.

Is it possible that so serious and important obligation of the shipowner as that of proving due inspection of this part of his vessel can be evaded by simply pleading ignorance of the part where the sea water entered?

Although competent surveyors were appointed to examine the *Folmina*, it is impossible that they could have examined the entire vessel with that minute care and attention which would have been bestowed upon the particular portion (had it been known) where sea water effected an entrance.

If the carrier were only to point out the part of the ship where water entered, it would in most cases be easy, by an examination of that part, to determine whether the admission of water had been due to unseaworthiness or to a marine casualty coming within the definition of a sea peril.

The law should hold the carrier to make compensation for every cargo loss happening to the goods while in his custody unless he make full disclosure of the circumstances attending the loss, and, in any event, sufficiently to show the nature of the act or occurrence to which the loss was due.

In the case of the *Mascot*, 48 Fed. 119; 51 Fed. 605, Judge Brown said:

> " All that the claimant can do to exonerate
> " the ship has doubtless been done; and after
> " all, the evidence shows nothing more than
> " that they cannot explain how the stains and

"defacing occurred. It negatives certain "causes that might under some circumstances "have produced the damage; but this is not, I "think, sufficient to release the ship from her "legal obligation. * * *

"The burden of showing that the damage "*arose* from such an excepted cause is upon "the ship (*Nelson* vs. *Woodruff*, *1 Black*, *156*). "As the *Mascot's* evidence does not show this, "*but merely leaves the damage unexplained*, "I must therefore hold the ship liable for this "item."

In *The Peter der Grosse*, 3 Asp. M. C. 195, neither party was able to explain a taint that had befallen a shipment of feathers. The carrier offered affirmative evidence that there was no condition on the ship that could have produced the result, just as here the *Folmina* has offered certain evidence in the hope of supporting the inference that there was no defect that could have permitted sea water to enter. The defence of the *Peter der Grosse*, for want of an explanation of the damage, was held insufficient by the Court of Appeal. The defence of the *Folmina* is no better.

See also *The Martha*, Olc. 140; F. C. No. 9145 (Betts, *J.*, 1845), and cases on pp. 21-25, *infra*.

The obligation of the carrier to explain fully the circumstances attending cargo losses has been uniformly insisted upon both in England and in this country for many generations.

Scarcely a case will be found (if, indeed, any case at all) in which a carrier has succeeded in escaping liability for damage to cargo without giving an explanation under which, either directly or indirectly, he has shown with reasonable clearness that the loss was of the excepted character; or if a "sea peril" exception was relied upon, that the damaged condition resulted from some described marine casualty or accident.

Once the carrier is able to show with the requisite degree of clearness that the damage is of an excepted character, the prevailing rule is that he need go no further to establish affirmatively that he was free from negligence in the premises; the shipper in this event having the burden of proving negligence. *Clark* v. *Barnwell*, 12 How. 272.

Nevertheless, there is a very respectable body of authority to the effect that even in this case it is contrary to public policy to impose upon the cargo owner a burden of proof which he is, from his inherent position, so ill adapted to bear:

Pittsburgh, &c., R. Co. v. *Racer*, 5 Ind. App. 209.

Tardos v. *Toulon*, 14 La. Ann. 429.

J. Russell Mfg. Co. v. *New Haven Steamboat Co.*, 50 N. Y. 121.

Mitchell v. *Carolina Cent. R. Co.*, 124 N. C. 236.

Pennsylvania R. Co. v. *Miller*, 87 Pa. St. 395.

Johnstone v. *Richmond, &c., R. Co.* 39 S. C. 55.

Alabama Gt. Southern R. Co. v. *Little*, 71 Ala. 611.

Central, &c., Co. v. *Hasselkus*, 91 Ga. 382.

Adams Express Co. v. *Stettaners*, 61 Ill. 184.

Louisville, &c., R. Co. v. *Thompson*, 13 Ky. L. Rep. 973.

Mahon v. *Steamer Olive Branch*, 18 La. Ann. 107.

Hinton v. *Eastern R. Co.*, 72 Minn. 337.

Southern Express Co. v. *Seide*, 67 Miss. 609.

Crow v. *Chicago, &c., R. Co.*, 57 Mo. App. 135.

Union Express Co. v. *Graham*, 26 Ohio St. 595.

Turney v. *Wilson*, 7 Yerg. (Tenn.) 339.
Brown v. *Adams Express Co.*, 15 W. Va. 812.
Kirst v. *Milwaukee, &c., R. Co.*, 46 Wis. 489.
Texas, &c., R. Co. v. *Richmond*, 94 Tex. 571.

IV.

Unexplained sea water damage to cargo is not of itself a sea peril, however seaworthy the vessel may appear.

1. The carrier's position in this case is that mere damage by sea water is sufficient to constitute a sea peril where the carrier has done what seems reasonable to ascertain the cause of the entrance of sea water and has been unable to find such cause.

Suppose a vessel leave port with a latent defect not discoverable by any reasonable means, either at the beginning or at the end of the voyage, and that by reason of such defect sea water necessarily enters. Under the contentions of the *Folmina* such an influx of sea water must be regarded as a sea peril, because all reasonable efforts have been made, without success, to discover the defect in the vessel or a marine casualty adequate to explain the result.

But it is well settled that a sea peril is something which may, not which must happen. It is something fortuitous, unforeseen.

Mr. Justice Story, in *The Reeside*, 2 Sumner, 567; F. C. No. 11,657, says the phrase "danger of the seas" must

> "be clearly understood to include only such
> "losses as are of an extraordinary nature or
> "arise from some irresistible force or some

"overwhelming power which cannot be
"guarded against by the ordinary exertions
"of human skill and prudence."

This is the accepted definition in this country:

The Warren Adams, 74 Fed. 413, 415.
Ins. Co. v. *Easton & M. Transp. Co.*
97 Fed. 653.

2. To say that the unexplained wetting with sea water of cargo in an apparently seaworthy ship is of itself a sea peril (as, the *Folmina* must argue, the first question certified should be answered), is to confuse a condition with a cause.

No doubt it is competent for carriers to exempt themselves from liability for losses of a particular *character;* that is, losses in respect of cargo of a particular nature or description, such as the damage incident to "breakage" or "rust" or "decay." The loss having been shown to be of that character, the carrier's exoneration follows presumptively; the shipper has the burden of avoiding the effect of the exemption."

The "sea peril" exception, on the other hand, does not apply to a character or description of damage, but to a *cause* of loss. The carrier cannot escape liability without satisfactorily tracing the causal connection between the damaged state of the goods and the sea peril.

The distinction between the two classes of exceptions is emphasized in *The Henry B. Hyde* and *The Lennox* (*infra*) and *The Patria* (*supra*).

In *The Henry B. Hyde*, 90 Fed. 114, 116, a libel for damage by breakage was dismissed; the bill of lading exempted the ship from liability for "breakage" and there was no proof of the cause of breakage. Judge Gilbert for the Circuit Court of Appeals for the Ninth Circuit, makes it clear that in the opinion of that Court, the exception of "breakage"

differs from the exception of "sea peril" in that the *mere condition* of the goods will bring the carrier presumptively within the protection of the exception of "breakage" but not within protection of that of "sea peril." The Judge says:

> "The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. In this respect, the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. *The Giava*, 56 Fed. 243; *The Warren Adams*, 20 C. C. A. 486, 74 Fed. 413. In such a case the duty rests upon the carrier to show that the damage *resulted* from the perils of the sea. In the present case the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof, therefore, rested upon the libellants to establish by the evidence that the breakage occurred through the negligence of the ship's employes."

The same distinction was recognized by Judge Brown of the Southern District of New York in the case of *The Lennox*, 90 Fed. 308, 309. The Judge says:

> "Where a loss arises from one of the excepted perils" (in that case breakage), "the ship is *prima facie*, excused. She can only be held upon affirmative proof that some negligence on her part was the efficient cause of the loss. * * * Conversely, where the loss is not by an excepted peril, the carrier takes the risk of explaining the cause of damage and of proving it to be a sea peril. It is insufficient for him to negative certain causes of loss. If on the whole the damage is unexplained, the ship in such case remains liable because she has taken that risk."

The language in *The Patria* was:

> "It is, no doubt, the rule, as appellant contends, that *when the damage is manifestly of the sort excepted*, the ship is under no obligation to show the promoting cause. To illustrate: if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the *sole damage* to the cargo in the case at bar were *manifestly decay*, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that the decay was caused by inherent defect.' If, however, the sole damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed."
>
> *The Patria, 132 Fed. Rep. 971, 972.*

3. There is no lack of decided cases where the Courts have declined to consider mere sea water damage as presumptively due to a sea peril.

In the case of *The Svend* (*Richards* v. *Hansen*) 1 Fed. 54, Mr. Justice Clifford held the carriers liable for damage by sea water to certain bundles of sheet iron. While the evidence was sufficient to show negligence in protecting the goods, it is evident from a perusal of the opinion that the learned Justice does not consider that the fact of such wetting with sea water is sufficient presumptively to consti-

tute a sea peril, so as to cast upon the shippers the burden of proving some fault of the carrier in permitting sea water to obtain access to the sheet iron. Mr. Justice Clifford says:

> "Sufficient also appears to show that the "goods, when shipped, were in good order and "condition, and that the covenant of the bill "of lading is that they shall be delivered in "like good order and condition. One thousand "bundles of the shipment, stowed in the for- "ward part of the aft lower hold, were badly "wet with salt water to such an extent that, "when the bundles were hoisted out to be "delivered, the water dripped out of the same "and appeared muddy with rust" (p. 55).
>
> "Dangers of the seas, said Judge Story, "whether understood in its most limited sense "as importing only a loss by the natural acci- "dents peculiar to that element, or whether "understood in its more extended sense as "including inevitable accidents upon that "element, must still in either case be clearly "understood to include only such losses as "are of an *extraordinary nature*, or arise "from some *irresistible force* or some over- "whelming power which cannot be guarded "against by the ordinary exertions of human "skill and prudence. *The Reeside*, 2 Sum. "571" (p. 61).
>
> "Where goods are shipped and the usual "bill of lading given, promising to deliver "the same in good order, the dangers of the "seas excepted, without more, and they are "found to be damaged, the *onus probandi* "is upon the owners of the vessel to show "that the injury was occasioned by one of "the excepted perils" (p. 62).

In *Bearse* v. *Ropes*, 1 Sprague, 331, F. C. No. 1192, certain hemp sustained damage of two different sorts: damage by oil and damage by sea water. Judge Sprague says:

> "It is insisted, indeed, on behalf of the "carrier that if he took the usual care and "precautions and conveyed these goods in "the usual manner" (including, of course, the

supplying of a seaworthy vessel), "he is not "responsible for damage whether arising "from danger of the seas or otherwise. To "this I cannot accede. In order to exonerate "himself from liability, he must bring him- "self within the exceptions of the bill of lad- "ing and show that the damage *arose* from "the danger of the seas."

The Zone, 2 Sprague, 19, F. C. No. 18,220, was a case of unexplained sea-water damage to a shipment of almonds. Says Judge Sprague:

"The burden of proof is, then, on the claim- "ants to show what caused the damage. "Theories may be formed as to the cause of "damage, and one theory which is no more "probable than another is that water may "have got in the between-decks during the "voyage. It must be borne in mind that one "of the reasons for casting the burden of proof "of the cause of damage (after the damage "itself has been shown) upon the shipowner "is that as to what takes place during the "voyage *no one except his agents can testify.* "This burden of proof does not allow of the "conclusive inference that the damage must "have arisen before shipment, *because the "ship was tight and well dunnaged*, and that "the ship owner will be relieved of his lia- "bility by such inference. The burden of "proof requires that the owner should go "farther and satisfy the Court that the dam- "age *arose* from one of the causes excepted— "anything short of this will not relieve his "responsibility. I cannot see that the claim- "ants have done this, *because my mind is left "in a state of uncertainty as to the cause of "damage, and I therefore must order a de- "cree to be entered for the libellants.*"

In *The Queen*, a mysterious leak developed in a seaworthy vessel. Says the Court:

"Has the carrier removed the presumption "of negligence cast upon him by the return "of the merchandise in a damaged condition, "wet with sea water? Was it sufficient to

"shift the burden of proof back upon the "shipper for the carrier to show that the ves- "sel was in a seaworthy condition at the com- "mencement of the voyage? * * * I "think not. The carrier does not thereby "overcome the presumption of negligence "which the law raises against him. *He can- "not absolve himself from blame by merely "showing such a state of facts that the Court "is unable to deduce how and in what man- "ner the damage has arisen.* He must show "affirmatively that the damage was *caused* "by peril of the sea or other cause excepted "on the contract of affreightment, and this "he must establish satisfactorily. He cannot "leave the matter in doubt."

The Queen, 78 Fed. 155, 165, 168; affirmed 94 Fed. 180, 196.

In the case of *The Centennial*, 7 Fed. 601, a cargo of sugar sustained serious damage from sea water. The Court found that the cargo was properly stowed and well dunnaged, and that the schooner was sufficient and suitable for the voyage. Cargo damage was due to an unexplained admission of water into the hold of the vessel, with which the pumps of the vessel proved unable to cope. Among the findings of fact made by Judge Lowell is one

"that the claimants" (the shipowners) "have "failed to prove distinctly that the damage "to the cargo was caused by perils of the "sea."

It is quite clear from the opinion that proof of seaworthiness and of good stowage, coupled with damage by sea water, was insufficient in the Judge's mind to make the case one presumptively of damage by a sea peril.

In the case of *The Lydian Monarch*, 23 Fed. 298, certain bales of burlaps were damaged by sea water, Judge Nixon says:

"The bill of lading acknowledging that "the burlaps was delivered to the steamer in "good order and condition, and the proofs "showing that it was damaged by sea water,

"it is incumbent on the respondent to prove
"that the loss was occasioned by perils of
"the sea. Failing in this, the company is
"liable for the damage sustained."

In the case of *The Compta*, 4 Sawyer, 375, F. C. No. 3069, a libel was filed to recover damages for injury to certain goods admittedly damaged by sea water. The ship defended under the sea peril exception and proved considerable heavy weather. Says Judge Hoffman:

"From the foregoing it may, I think, rea-
"sonably be concluded that the weather
"experienced by the vessel was such as might,
"possibly, have produced, on a stanch and
"seaworthy ship, the effects attributed to it
"by the claimants. But that it was not
"of such unusual and extreme sever-
"ity as to justify the assumption, with-
"out further evidence, that it caused
"the leaks which occasioned the dam-
"age. The carrier, to make good his
"defense, is bound to show that the damage
"arose from a sea peril. It is not enough for
"him to show that it might have arisen from
"that cause. He must prove that it did.
"This proof can be afforded either by show-
"ing a sea peril of such a character that
"injury to the vessel, however stanch and
"seaworthy, would be its natural and neces-
"sary consequence; or, by the direct testi-
"mony of those who observed its effect upon
"the ship; or, by proving her condition on
"her arrival; or, he may exclude every other
"hypothesis of causation by satisfactory
"proof that she was tight, stanch and sea-
"worthy at the commencement of the voy-
"age."

To the same effect:

The Sloga, 10 Ben. 315; F. C. 12,955.

The Phœnicia, 90 Fed. 116, 119; 99 Fed. 1005.

Ins. Co. v. *Easton & M. Transp. Co.*, 97 Fed. 653.

The Presque Isle, 140 Fed. 202, 205.

4. It is not, of course, contended that the carrier relying on the "sea peril" exception, must always show *directly* and explicitly by his proofs a loss by a marine casualty or accident. Such losses may well be shown with sufficient clearness indirectly by substantial evidence. An inference of loss by sea peril was very properly drawn in the case of *Hooper* v. *Rathbone*, Taney, 519; F. C. 6676, from convincing evidence of seaworthiness and *stress of weather*. In this case it was shown that sea water was admitted during a storm, although a storm

> "not violent enough to dismast her or carry
> "away her sails."

Her pumps became choked and she was compelled to put into a port of refuge. The ship was

> "proved to have been among the strongest
> "ever built in Baltimore. Yet this ship,
> "strong as she was, had been so strained by
> "the rough weather to which she was ex-
> "posed that she leaked considerably more
> "than at the beginning of the voyage and re-
> "quired a good deal of caulking in her upper
> "works to enable her to proceed from St.
> "Thomas to Liverpool."

Mr. Justice Taney was clearly justified in attributing the entrance of sea water to the storm, but there is not one line in the opinion to suggest that he considered the mere non-negligent presence of sea water in a seaworthy ship as of itself a sea peril. And the case has heretofore been understood as announcing a doctrine of precisely the opposite character.

The Queen of the Pacific, 75 Fed. 74, 78.

The Lydian Monarch, 23 Fed. 298, 299.

V.

The English decisions would not relieve the Folmina from explaining the entrance of sea water.

Certain decisions in England have no doubt been very liberal to the carrier in defining the scope of a "peril of the sea" as the phrase is used either in a marine insurance policy or in a bill of lading.

The Xantho, 12 App. Cas. 503.
Hamilton v. *Pandorf*, 12 App. Cas. 518.
Blackburn v. *Liverpool, Brazil & River Plate Steam Nav. Co.* (1902) 1 K. B. 290.
The Southgate (1893), Prob. 329.
The Cressington (1901), Prob. 152.
The Glendarroch (1894), Prob. 226.

Liberality towards carriers is not unnatural in a nation composed largely of ship owners, by whose courts even negligence clauses have been sustained as valid.

In each of the foregoing cases, the cause which operated to admit the sea water was clearly and satisfactorily established by the carrier.

In *The Xantho*, the possibility of being run down and sunk by another vessel negligently navigated was held to be a peril of the sea within the meaning of the bill of lading. Lord Herschel says:

> "I am aware of only one case which "throws a doubt upon the proposition that "every loss by the incursion of the sea due "to a vessel coming accidentally (using that "word in its popular sense) into contact "with a foreign body which penetrates it "and causes a leak, is a loss by the peril of "the sea."

In *Hamilton* v. *Pandorf* (*supra*), rats had gnawed a lead pipe connecting with the bathroom of the steamer Inchrhona. In this manner, water after-

wards entered from time to time and damaged cargo, the suit being instituted on behalf of the latter under the bill of lading. Two of the Judges (Bramwell and MacNachten) approved a decision which had been made in the lower Court by Lopez, *J.*, 16 Q. B. D. 629, 633, in which that Judge had said:

> "In a seaworthy ship, damage to goods "caused by the action of the seas during "transit, not attributable to the fault of any- "body, is, in my opinion, 'a danger or "'accident of the sea' intended to come "within the exception and exonerate the "shipowner. It is clear that the action of "the sea itself is one of the causes contem- "plated."

The favor which this too general and somewhat undiscerning dictum (which evidently did not receive the concurrence of Lord Esher, 17 Q. B. D. 670, 681) nevertheless received in the House of Lords, is to be explained by the fact that the House of Lords on that particular day was principally interested in overruling an erroneous legal theory theretofore prevalent: the theory that in determining liability under policies of insurance, the courts will regard the *causa proxima* in the narrow and literal sense of that expression; whereas in construing a bill of lading the courts will regard the *causa causans*, or antecedent cause—that is, the negligence, if any, of the crew of the vessel in making the marine peril operative.

In *The Xantho, supra*, decided almost concurrently with *Hamilton v. Pandorf*, this fallacy was definitely corrected. The case of *Woodley v. Michell* (1883), 11 Q. B. D. 47, which it reversed, had been decided upon the theory that, while a collision between the two vessels might be the *causa proxima* of the cargo damage, the *causa causans* was the negligence of the non-carrying vessel, and that in a bill of lading suit the *causa causans* only must be

regarded; that, therefore, the sea peril clause of the bill of lading was not operative.

The House of Lords, although putting itself squarely upon record as holding that the phrase "sea peril" has the same meaning in a bill of lading as in a policy of insurance, does not in either of those cases abandon the point of view that in determining what is a *causa proxima* the order of time is to be regarded rather than the importance or efficiency of the particular cause that produces the loss. It is, therefore, pleased to regard the mere influx of water as the *causa proxima* instead of the agency by means of which the opening in the ship's side may be brought about.

But there is nothing in these cases to encourage the view that a carrier may leave the mode of entrance of sea water into a ship entirely a mystery and still escape liability on the theory that such a loss is, *prima facie*, a sea peril.

Under the English rule, as stated in these cases, the burden is still on the carrier to satisfy the Court that the sea-water did not enter the ship through any defect of the ship constituting unseaworthiness or through any unexcused default on the part of the carrier. If the carrier does not explain the manner in which sea-water entered, the inference of seaworthiness cannot, in most cases, safely be drawn; for the most skillful and experienced surveyors are subject, like other men, to the imperfections of the human senses.

In *Hamilton* v. *Pandorf*, the carrier had, in fact, assumed the burden of proving, and had proved, the exact cause of the entrance of water, namely, the action of rats. He showed the orifice through which the water entered. The cargo owner had the fullest opportunity of verifying the carrier's story and of being satisfied that the vessel was seaworthy.

The fundamental difference between the case of *Hamilton* v. *Pandorf* and the present case is that

there, the entrance of sea water having been fully explained, and shown to be due to a cause consistent with the vessel's original seaworthiness, there was no circumstance left in the case to challenge the conclusion to be founded upon testimony of the ship's witnesses to the effect that upon such examination as they were able to give, the vessel appeared to be seaworthy.

In the *Folmina*, the evidence that competent men searched for defects and found none is squarely met and balanced by the admitted fact that sea-water *did* enter the vessel, and that they have not been able to explain or to suggest an explanation for such entrance, consistently with their hypothesis of seaworthiness.

But absolute seaworthiness is something that all possible care and diligence may sometimes fail to secure; it is something the lack of which the most scrupulous examination may sometimes fail to disclose.

The Edwin I. Morrison, 153 U. S. 199, 210.
The Carib Prince, 170 U. S. 655.

The burden of proving seaworthiness is upon the carrier.

The Wildcroft, 201 U. S. 378.

It does not follow that because damage due to unseaworthiness may have become apparent, the defect constituting unseaworthiness must also become apparent. It may still remain latent and undiscoverable.

While the discovery of defects may establish unseaworthiness, *an unsuccessful attempt to discover defects cannot establish seaworthiness.* The latter can only be inferred, for the purpose of judicial decision, from the circumstances of each case.

Steele v. *State Line S. S. Co.* 3 App. Cas. 72.

The four minor English cases mentioned above (p. 27), turn upon the peculiar doctrine of the English law which treats a negligent carrier as innocent where his bill of lading contains a negligence clause. *Liverpool Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 447. They can have no possible influence upon the development of law in this country.

The Saratoga, 20 Fed. 869, 872.
The Reeside, 2 Sumner, 567, 571.
The Titania, 19 Fed. 101.

VI.

The only inference properly drawn from the facts certified is that sea-water entered the *Folmina*, not owing to any sea peril, but owing to the steamer's latent unseaworthiness or owing to some undiscovered internal mishap similar to that which occurred in the case of *The G. R. Booth* or owing to some other cause for which the steamer is liable.

The possibilities of the situation, as they appear to us, have already been stated (pp. 9-10, *supra*).

The carrier having the burden of explanation, the legal inference from failure to explain is that sea-water found entrance to the hold of the *Folmina* owing to some cause for which the carrier is legally liable.

Nelson v. *Woodruff*, 1 Black 156, 160,
The Warren Adams, 74 Fed. 413, 414.

The inference of unseaworthiness as the explanation of the entrance of sea water is not in the least inconsistent with the certificate of the Circuit Court of Appeals, which refers to the *Folmina* as only ap-

parently seaworthy (First question submitted). Even an unseaworthy vessel would be entitled to rely upon the protection of bill of lading exceptions, if it could be shown that there was no causal connection between the cargo damage and the unseaworthiness.

The Caledonia, 157 U. S. 124, 132, 136.
Carver, Carriage by Sea, Sec. 17.

VII.

The questions certified to this Court by the Circuit Court of Appeals for the Second Circuit should be answered in the negative.

Respectfully submitted,

WALLACE, BUTLER & BROWN,
Proctors for Libellant.

FREDERICK M. BROWN,
Advocate.

[redacted]

SUPREME COURT OF THE UNITED STATES.

October Term, 1908.

GUSTAVE A. JAHN, *et al.*,
Libellants-Appellants,

vs.

STEAMSHIP *Folmina*,
WILLIAM VAN EYKEN,
Claimant-Appellee.

No. 84.

BRIEF FOR THE FOLMINA.

This cause comes before this court on a certificate from the United States Circuit Court of Appeals for the Second Circuit.

The certificate states that the cause came before the Circuit Court of Appeals on an appeal from a decree of the District Court for the Eastern District of New York, dismissing a libel, and that upon the hearing of the appeal, questions or propositions of law arose concerning which it desires the instruction of the Supreme Court. The Court thereupon stated the facts and certified the questions as follows:

"STATEMENT OF FACTS.

The facts upon which the questions arise are as follows:

"The S. S. *Folmina* sailed from Kobe, Japan, for New York with a large shipment of rice on board, in No. 3 hold under a bill of lading which exempted the carrier from 'The Act of God * * * loss or damage from * * * explosion, heat, or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers, and canals and of navigation of whatever nature or kind.' It further provided that the ship 'is not liable for * * * sweat, rust, decay, vermin, rain, spray.'"

"The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

"A majority of the court are satisfied that the damage was caused by sea-water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

"The *Folmina* was a steel steamship of the highest class in Lloyds' Register. Before starting for Japan she was in drydock at New York and was there surveyed by Lloyds' surveyor. Some time before she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder-quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

"During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold, and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea-water—if that be considered evidence) was found that there had been leaks in any part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy.

"QUESTION—CERTIFIED.

"Upon the facts above set forth, the questions of law concerning which this Court desires the instruction of the Supreme Court are:

"1. Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

"2. Whether the ship is relieved from liability in consequence of said exception?

"In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, establishing Courts of Appeal, the foregoing question of law is by the Circuit Court of Appeals of the United States

for the Second Circuit, hereby certified to the Supreme Court.

"New York, May 7th, 1907.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge.
ALFRED C. COXE,
Circuit Judge."

The decision of Thomas, *J.*, dismissing the libel in the District Court is reported in 143 Fed. Rep., 636.

The opinion of the Circuit Court of Appeals, affirming the judgment of the District Court, is reported in 153 Fed. Rep., 364.

Subsequently, the libelant moved for a re-argument or, in the alternative, that certain questions of law be certified to this Court; and one of the Circuit judges, being of opinion that the damage was caused by sweat, and the other two being divided in opinion as to the correctness of a *dictum* in one of their previous decisions, as to the meaning of an exception of "damage caused by peril of the sea," 153 Fed. Rep., at p. 366, the questions appearing in the certificate were certified.

FIRST POINT.

THE QUESTIONS CERTIFIED ARE PREDICATED ON THE ASSUMPTION THAT THE STEAMSHIP WAS SEAWORTHY AND THAT THE DAMAGE TO THE CARGO OCCURRED WITHOUT THE FAULT OF THE MASTER, OFFICERS OR CREW.

The appellants contend that there is no finding

by the Court of Appeals, one way or the other, on the questions of seaworthiness; and that the statement that there is no proof of negligence on the part of the carrier, is merely negative. From these premises it is argued that inferences should be drawn by this Court that the damage may have been due to unseaworthiness or to negligence.

The language of the certificate does not justify the construction put upon it by the appellants.

The statement that "there was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew," is a finding, for the purposes of the certificate, that there was no such negligence, fault or error. Inferences from the facts and circumstances in evidence are a species of proof, and a finding that there was no evidence tending to show any negligence, fault or error, is a finding that no inferences of negligence existed.

On the subject of seaworthiness the certificate is equally conclusive. It states that the *Folmina* was a steel steamship of the highest class in Lloyds' register; that before starting for the round voyage to Japan and return she was in drydock at New York, and was there surveyed by Lloyds' surveyor; that some time before she had been in drydock at Cardiff, where some repairs had been effected; and that the master testified to the general good condition of the steamer at the time she sailed from Kobe.

What had been done before the vessel sailed from Kobe was evidence of care on the part of the owners in the maintenance and upkeep of the vessel.

In the absence of anything to the contrary the testimony of the master of the actual good condition of the steamer on leaving Kobe established such good condition. The actual condition of the vessel at that time means seaworthiness.

The statements that "during and after delivery of the cargo the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold (where the damage occurred) were carefully examined by the officers of the ship, by surveyors representing libelants and their underwriters, and that it was afterwards examined by competent and experienced surveyors representing both parties," that "the decks, hold, side plating and rivets of the ship were found to be sound, intact and free from leaks"; and that "no adequate means of access of sea-water were to be found, nor any defect in the steamer, which then appeared to be seaworthy"; when considered in connection with the finding that the steamer was in good condition at the beginning of the voyage, can only mean that the vessel was actually seaworthy under the facts here.

The examination by competent surveyors, and their inability to find any defect, negatives the possibility of unseaworthiness. The fact of damage alone could not justify an inference of unseaworthiness. The production of proof as to good condition, both at the beginning of the voyage by the master, and at the end of the voyage by the surveyors, leaves no room for presumptions. A presumption properly exists only in the absence

of proof as to circumstances with respect to which, in the absence of proof, a presumption might have been indulged.

The existence of a possible latent defect is negatived by the proofs, because examinations of the vessel both before and after the damage failed, according to the statements, to discover any defect. A latent defect means a real defect discovered after the loss to which defect the loss is traced. The certificate specifically states that no such defect was found.

The appellee accordingly maintains that the questions certified are based upon findings that the ship was seaworthy; that the loss occurred without the negligence or fault of the ship's officers or crew; that the language of the certificate is intended to present merely the legal question whether the entrance of sea-water into a seaworthy ship without the fault of the ship's officers or crew in some manner which could not be explained, was "a danger or accident of the sea or of navigation."

Though the statement of facts in the certificate is incomplete and the first question perhaps does not fully indicate the hypothesis on which it is based, yet, the true intent and scope of the questions propounded will be made clear by reference to the opinions delivered in the courts below.

The issues raised by the pleadings appear in the opinion of Judge Thomas. *The Folmina,* 143 F. R., 636. The libel charged that the rice was "wet with seawater" when delivered; but there was no

averment that the wetting arose from the unseaworthiness of the ship. The claimant pleaded the exceptions contained in the bill of lading, part of which appear in the certificate. 143 F. R., at p. 637.

The District Judge stated in great detail the manner of stowage, the part of the hold in which the damaged rice was found, and the character and extent of the damage. The learned judge then, at p. 637, continued:

"The evidence shows that the damage was caused by sweat and heat, or sea water and consequent heat. For some purposes of discussion let it be assumed that sea water entered and injured the cargo. Yet the evidence shows that it did not enter by reason of any negligence on the part of the master or crew, or of the carrier in outfitting the ship for the voyage. Hence, the invasion of the sea was beyond the cognizance or avoidance of the carrier or his servants, and without the fault of either. What was demandable of owners or crew to keep out water they did. There was upon arrival at New York no defect in the ship that accounted for the sea water. None was discovered during the voyage, whose history also shows that the crew by culpable action or omission did not suffer it to enter. Hence, when the libelant charges receipt of sound goods and delivery of the same injured by sea water, the carrier shows that neither he nor his servants were negligent in connection with the suggested injurious cause.

"The rule that when the fact is in doubt, or the court is in doubt as to the fact, the burden is on the carrier to solve the doubt, has been fully met.

"The carrier points to a sound ship, to which sea water could not gain access, and shows the

existence of such condition during the voyage, and due preparation of the ship for the protection of the cargo, and ample care during the voyage. Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect.

"Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one, and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permitting its existence are absent. Immediately one suggests any practical way for sea water to enter, for instance around the scupper pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet or a strained plate justifies even suspicion. Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo disputes the possibility. Yet the libelants persist that the ship should, to free itself, make further disclosures. Why? Conjecture even as to the case has been exhausted, and the carrier to such limit has shown his innocence. Neither imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached.

"When it appears that the carrier not only used due diligence to furnish a seaworthy ship, but did actually furnish the same, that he used proper care in stowing the cargo, that his servants did not, by undutiful act or omission, suffer

the cargo to be injured, that no defect was discovered during the voyage, and none existed at its termination, the carrier and his servants at least, are not chargeable with negligence.

"Neither is the carrier in this case liable as an insurer, for he expressly stipulated against damage from sea water, to which was impliedly attached the proviso that his own and his servants' fault did not aid or suffer the same. Now the absence of the fault has been shown. Hence the proviso has been met and the stipulation for exemption takes effect. There may be some mystery about the damage. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as a fact, if the report of the libelants' analysis had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship, strongly aids the evidence that it did not enter. But that is left undecided.

"If the injury was the result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. *Clark* v. *Barnwell,* 12 How., 282; *The Prussia,* 93 Fed., 837, 840.

"If the injury arose from sea water, without the carrier's fault, he is released by the stipulation, provided he shows that fact. *Clark* v. *Barn-*

well, supra; Transportation Co. v. *Downer,* 11 Wall., 129. *Cau* v. *Texas and Pacific Ry. Co.,* 194 U. S., 427. The evidence shows that it did arise either from heat and sweat, or sea water and consequent heat. Hence, the case is within the exception, and in either alternative the evidence exculpates the ship. In the present case the ship, from physical examination, appears to have been absolutely seaworthy at every stage of the adventure. To this it is answered that she was not seaworthy when and where the assumed seawater entered; and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her eastern voyage, the inspection and care of the hold before the rice was loaded, the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single suspicious condition appeared, all this points to but one conclusion, that the owners or their agents used due care in sending her out from Japan, and the crew discovered no defect on the way, and that no defect was discoverable. It does not seem just to condemn a ship with such a history.

"The decision is placed upon the ground that the facts show that the ship was not negligent, although the Supreme Court has decided in *Clark* v. *Barnwell, supra; Transportation Co.* v. *Downer, supra; Cau* v. *Texas & Pacific Ry. Co., supra,* that when the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading, did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened."

The opinion of Judge Thomas shows that the question of the seaworthiness of the vessel was

thoroughly dealt with at the trial, and that the most searching examination by surveyors of the highest competency, representing both parties, who examined the ship separately and collectively, failed to discover the slightest evidence of unseaworthiness.

"The test of seaworthiness," as stated by Mr. Justice Gray in *The Silvia*, 171 U. S., 462, 464, "is whether the ship is reasonably fit to carry the cargo which she has undertaken to transport."

The testimony detailed by Judge Thomas clearly showed that the ship was seaworthy within the meaning of this rule, and in his opinion, if the loss was by sweat, it was specifically excepted by the bill of lading, and if it was by sea water it was, under the facts of the case, within the exception of "dangers and accidents of the seas * * * and of navigation."

While the *per curiam* opinion of the Court of Appeals, 153 F. R., 364, indicates that no two of the judges who heard the case agreed as to the grounds on which the decision should be affirmed, yet neither one of the two who were for affirmance, nor the judge who was for reversal, intimated the slightest doubt as to the reasonable fitness of the ship for the voyage.

The complete opinion of the Court of Appeals, 153 F. R., at p. 365, which details the differences of opinion between the judges, is as follows:

"The opinions of the three members of the

court upon the questions presented in this case are so discordant that no good purpose will be served by any detailed statements of the reasons by which they reach their several conclusions: It will be sufficient to indicate what those conclusions are.

"Evidently the conclusion of the district judge was arrived at by first determining upon whom the burden of proof rested. And it would seem that in determining that preliminary question he assumed that the bill of lading stipulated against damage by 'sweat' and damage by 'sea water.' The stipulations, however, are in fact against damage by 'sweat' and damage by 'perils (dangers and accidents) of the seas.'

"This court recently considered the question of burden of proof in the case of the *Patria*, where the exceptions were 'perils of the seas' and 'decay of any kind'; and expressed itself as follows:

" 'It is, no doubt, the rule, as appellant contends, that when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but, if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken—although the libelant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states in his brief, 'for decay caused by inherent defect,' the ship would have the burden of showing that

the decay was caused by inherent defect. If, however, the sole damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed.' The *Patria,* 132 Fed Rep., 971, 972.

"One member of the court as at present constituted is of the opinion that where the damage is caused by sea water the statement of the rule as given in the above excerpt is too broad; that under the English authorities *Hamilton* v. *Pandorff,* 16 Q. B. D., 633; 12 App. Cas., 523 and subsequent cases, the ship owner is relieved when he shows that the damage is caused by sea-water and there is no evidence that any fault, negligence or unseaworthiness of the ship allowed it to enter; and that the American Cases, *Cooper* v. *Rathbone,* Taney, 519; *The G. R. Booth,* 171 U. S., 450 are in accord with this construction. Therefore, although not satisfied by the proofs that the damage was caused by sweat he votes to affirm.

"The other two judges adhere to the rule laid down in the *Patria,* but one of them is satisfied that the weight of evidence is to the effect that the damage was not caused by sea water, but by sweat. Therefore, he votes to affirm. The other judge is not persuaded by the evidence to a finding that the damage was caused by sweat, and, believes that sea water was the cause. He does not think that, under the decision of the *Patria* case, the shipowner need show just how the water got in, but that he must show sufficient stress of weather to warrant the inference that it came in because of the action of external causes. And there being no evidence of such stress of weather

he votes to reverse. The result is that the decree is affirmed with costs."

After the filing of this opinion, the libelant filed a written application for a re-argument, or, in the alternative, for the certification to this court of certain questions of law. In deciding that application the Circuit Court of Appeals filed the following memorandum:

"On Monday, April 29th, at the opening of court, counsel may be heard briefly in re-argument upon a single point. That is whether, upon the finding of a majority of the court that sea water caused the damage, a statement of facts can be prepared which both sides will approve and upon which there may be certified to the Supreme Court the question whether the rule stated by this court in the case of *The Patria*, 132 F. R., 971, as to burden of proof should be applied in the disposition of the cause." *Record*, p. 613.

The parties being unable to agree upon the form of a certificate, the court prepared the certificate and questions which are now on file.

There was no question of seaworthiness involved in *The Patria*, above referred to. 125 F. R., 425; affirmed, 132 F. R., 971. The claim was for damage to a consignment of "giant beans" which had been damaged on a voyage from Marseilles to New York. Some of the beans on delivery "were shriveled, soft and spoiled,—might fairly be said to be decaying,—but these bags also contained the black substance which the witnesses for the libelant, including the chemist, unite in describing as coal dust." The ship de

fended under an exception of "decay." The actual ruling was that as the entire damage was not "decay," the libelant should recover. The seaworthiness of the ship appears to have been assumed in both courts. In the course of the opinion of the Court of Appeals, Lacombe, J., in dealing with the burden of proof, under the exception of decay, used the illustration, quoted at p. 13, which one of the judges who heard this case apparently considered to have been incorrect.

It is apparent, therefore, from the course of the proceedings, that the purpose of the certificate is to inquire whether the dictum contained in *The Patria,* or the statement of the rule of law found in the English cases, thus referred to, is correct.

As the existence of a condition of seaworthiness was assumed in *The Patria,* and lies at the basis of the definition contained in the English cases, it must be presumed, for the purposes of this discussion, that the questions certified are predicated on the necessary assumption that the *Folmina* was a seaworthy ship.

Moreover as two of the judges who signed the certificate had previously voted to affirm the decree on the ground that the loss was excepted by the bill of lading—one of them being of opinion that it was within the exception of "sweat," and the other that it was within the exception of "dangers and accidents of the seas and of navigation" —the majority at least must have found that the ship was seaworthy and without fault. If they

had not so found they could not have voted to affirm. As there was no reargument on the merits of the case, it cannot be assumed that the majority meant, by the terms of the certificate, to retract their finding on these points.

Unless the Court of Appeals found that the *Folmina* was seaworthy, the question whether she is relieved from responsibility for the loss by the exceptions in the bill of lading could not have arisen. The right to claim the benefit of exceptions is predicated on the seaworthiness of the ship. *The Caledonia,* 157 U. S., 124, 137, *The Carib Prince,* 170 U. S., 661, 662. If she was unseaworthy, the Court of Appeals would have been bound to hold her liable for the loss, and she could not have claimed the benefit of the exceptions. The fact that the Court of Appeals has certified to this court questions as to the character of the loss and whether it is within the exceptions, carries with it a necessary assumption that the question relates to a seaworthy ship. The ship being found to be seaworthy, her responsibility would depend on the answer that should be given to the question whether the loss was of the excepted class. But unless she was found to be seaworthy no such question could have arisen. The fact, therefore, that the Court below considered the question whether the loss was within the exceptions, and at first decided it in the shipowner's favor, and subsequently certified it to this court, conclusively shows that the condition of seaworthiness, on which alone the carrier can claim the

benefit of the exceptions, was found by the court below to exist.

Unless the questions certified are predicated on the conclusion that loss occurred on a seaworthy ship, and without the ship's fault, the certificate would not conform to the requirements of the statute. In *United States* v. *Union Pacific Railway Co.*, 168 U. S., 505, 512, the court stated that a question certified must "be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case."

It would be a most violent presumption to suppose that the Court of Appeals could have intended to leave the seaworthiness of the ship to be determined by this court on inferences from the very meagre statement of facts found in the certificate. The appellants ask the Court to indulge in inferences on this subject, *Brief*, p. 31, but we do not understand that the practice would sanction it; and, if the ship is not to be regarded as found to be seaworthy, for the purposes of this hearing, the claimant would wish to renew his application, which is on file, for a writ of *certiorari*, so that the question of seaworthiness could be decided on the entire record.

SECOND POINT.

THE DAMAGE TO CARGO FOUND TO HAVE BEEN CAUSED BY THE ENTRANCE OF SEA WATER INTO A SEAWORTHY SHIP, WITHOUT THE SHIP'S FAULT, IS "A LOSS BY A DANGER OR ACCIDENT OF THE SEA OR OF NAVIGATION," WITHIN THE MEANING OF THE EXCEPTION, EVEN THOUGH IT CANNOT BE DETERMINED, UNDER THE SPECIAL CIRCUMSTANCES, JUST HOW THE WATER GOT IN.

It should be noted at the outset that the exception in the bill is not "of sea perils" as stated in the first question, but is of "*dangers and accidents of the seas and of navigation.*" The latter exception is much broader in form, and apparently is broader in scope than the former.

A "peril" is "a danger; risk; hazard; exposure of person or property to injury, loss or destruction." An "accident," on the other hand, is an *event.* It is "anything that happens or begins to be without design, or as an unforeseen effect; that which falls out by chance; a fortuitous event or circumstance."—*Century Dictionary.*

An accident, so far as concerns the shipowner, may be purely fortuitous, or it may result from the faults of his servants. If he is not personally at fault, the fact that water enters the ship and damages the goods is clearly an accident as to him and as to the goods. If the entrance of the water had been contributed to by some fault of the crew that circumstance might have involved the owner in liability for it; but it would not have made it any the less an accident so far as the owner is concerned. But the crew were not in

fault, so that questions which might have arisen if they had been to blame need not be considered. The fact that the water accidentally entered the ship from the sea during the voyage, would mean in the ordinary use of language, unless some legal rule to the contrary exists, that it was an "accident of the seas or of navigation." As was said by Mr. Justice Walton, in *Blackburn* v. *Liverpool, Brazil and River Plate Steam Navigation Company* [1902] 1 K. B. 290, 295: "If by some accident the ship is not kept tight, and the water comes in and damages the cargo, that is damage by an accident or peril of the seas."

The argument of the appellants is based on the theory that the exception of "dangers and accidents of the seas and of navigation" is of no broader import than the exception "perils of the seas," and that damage to cargo by sea-water cannot be brought under the exception of "dangers and accidents of the seas," unless the carrier is able to show, and does show the exact nature or cause of the injury which let the water into the ship, as distinguished from the cause of the damage to the cargo, and that the cause of the inflow of water was extraordinary, violent and external to the vessel.

In support of this contention the appellants rely on a *dictum* of Mr. Justice Story, in *The Reeside*, 2 Sumner, 567; but it is not authority for their proposition. The entire passage of his opinion, of which a part is quoted in appellants' brief is as follows:

"The phrase 'danger of the seas,' whether un-

derstood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence."

The exception in that case was, "of danger of the seas," which is obviously not so broad as "dangers *or accidents* of the seas *and of navigation.*"

Moreover, the learned justice was not dealing with a case in which sea-water had entered a seaworthy ship without the ship's fault, and caused damage to the cargo. He was considering a case where bales of carpeting had been damaged by the leakage from a consignment of 200 barrels of oil which had been stowed in the same compartment with the carpeting. It was claimed that the barrels had been properly stowed and that the leakage had been caused by the rolling of the vessel in heavy weather; but the Court found, "that the whole damage was occasioned by the uncommon leakage from the casks *arising from their bad condition when shipped,*" and that, "there is no evidence in the present case which satisfies my mind that if the oil had been *properly coopered* and properly stored the rolling of the vessel in the manner stated would have produced any such damage as occurred in this case."

The decision, in effect, was that the damage was

due to *want of care in stowing improperly coopered casks of oil in dangerous proximity to the carpeting,* and the language of the learned justice with regard to the scope and effect of the exception of dangers of the seas had special reference to the case then before him. Such a loss as he was dealing with was in no sense extraordinary.

The learned justice was not considering so much the nature or character of a loss by peril of the sea, as the question whether under all the circumstances the carrier in that case had used that degree of care to avoid the damage which would entitle him to exoneration under the exception of "dangers of the seas."

A case more nearly resembling that of the *Folmina* in principle is *Montoya et al.* v. *London Assurance Co.,* 1851, 6 Exch., 451; 86 R. R., 364. That was an action on a policy of insurance on tobacco, for damage claimed to have been caused by perils of the seas. The tobacco had been stowed on top of hides, and the ship having leaked, the hides became soaked with sea water. The tobacco was spoiled by fumes from the rotting hides. It was held that the damage to the hides was caused by a sea peril and that the damage to the tobacco was also attributable to the same cause. Platt, Baron, said at page 460:

"It appears to me, therefore, whatever mischief is occasioned to the cargo by the shipping of sea water, is a loss occasioned by the perils of the seas, and that the insurers are liable to make the loss good."

Even if the *dictum* of Mr. Justice Story in *The Reeside* be regarded as a correct statement of the law, it would not exclude the treatment of such a loss as occurred in this case as a "danger of the seas." He states that the phrase "danger of the seas" must be held to include only such "losses as are of an extraordinary nature, or arise from some irresistible force," &c. But the expression "losses of an extraordinary nature" means no more than that a damage to cargo by sea water cannot, as between shipper and carrier, be treated as a danger of the seas, if it is shown to have arisen from *ordinary wear and tear,* negligence or unseaworthiness. *Arnold Mar. Ins.*, 7th Ed., pp. 918, 919, 920. A damage to cargo by sea water, occurring in a seaworthy ship, without the fault of the officers or crew, and not arising from ordinary wear and tear, is "of an extraordinary nature" and within the exception. *Hamilton* v. *Pandorff*, 16 Q. B. D., 633, 635; 12 App. Cas., 523; *Davidson* v. *Bernand,* L. R., 4 C. P., 117, 122.

If, as the appellants seem to contend, the statement of Mr. Justice Story meant that only sea water losses which are occasioned by extraordinary violence of the winds or waves can be treated as "dangers of the seas," the effect of it would be to say that the exception of "dangers of the seas" is practically synonymous with that of the "Act of God." The statement, so limited, would be inaccurate. It has been held in a number of cases that the exception "dangers and acci-

dents of the seas and of navigation" is a much broader exception, and covers many contingencies which would not be covered by the phrase "Act of God."

In *Clark* v. *Barnwell,* 12 Howard, 272, spools of thread in the hold of a vessel were injured by humidity and dampness resulting from sweat. The bill of lading contained the exemptions "all and every the dangers and accidents of the seas and navigation of whatsoever nature and kind." Mr. Justice Nelson said at p. 282:

"Now the evidence showing very satisfactorily that the *damage to the goods was occasioned by the effect of the humidity and dampness,* which in the absence of any defect in the ship or navigation of same, or in the stowage, *is one of the dangers and accidents of the seas* for which the carrier is not liable, the burden lay upon the libelants to show that it might, notwithstanding, have been prevented by reasonable skill and diligence of those employed in the conveyance of the goods. * * * "No doubt the unusual duration of the voyage on account of tempestuous weather and adverse winds, in connection with the fact that it was one in which the ship passed from a northern to a southern latitude and in a season of the year when a change from a cold to a warm climate must have been considerable, greatly increased the damage and also the influence of it on goods liable to damage from that cause. But the carrier is not responsible for delay on the voyage on account of boisterous weather or adverse winds, low tides or the like, as was held in the case of *Boyle* v. *M'Laughlin,* 4 Harr. & J., 291. These are *dangers and accidents of navigation* over which he has no control and against which his contract contains no warranty."

To the same effect, *The Viscount*, 11 Fed. Rep., 169.

Mr. Chief Justice Fuller, in *The Majestic*, 166 U. S., 375 at 386 said: "The words 'perils of the sea' may indeed have grown to have a broader signification than 'the act of God.' "

A careful examination of American cases as well as English cases indicates that the decisions have gone far beyond holding that it is necessary that there should be a severe storm or other extraordinary accident to constitute "a danger or accident of the seas." A leak caused by rats, in spite of due precaution to prevent their presence on board, is a peril of the sea. *Garrigues* v. *Cox*, Pa., 1 Bin., 592, 598; 2 American Decisions, 493. A sudden leak by which a vessel seaworthy at the inception of the voyage foundered without any extraordinary stress of weather or other apparent cause, was held to be a peril of the sea. *Patrick* v. *Hallett*, 1 Johns., 241.

In *Starbuck* v. *The Phœnix Insurance Co.*, 62 N. Y. Supp., 264, water came into a vessel through an open port shortly after she sailed, and she sank without having encountered any storms. The Appellate Division approved a charge of the trial court, which said:

"If the dead light, although sufficiently secured, became open through accident and the loss arose from a cause not reasonably to be anticipated or guarded against by the owners, it is for you to say whether this is not damage done by a peril of the seas within the definition which I have stated."

A judgment for the plaintiff was affirmed in the Appellate Division, 47 App. Div., 621, and on further appeal it was affirmed without opinion by the Court of Appeals, 166 N. Y., 593.

In *Potter* v. *The Insurance Co.*, 2 Sumner, 197, Mr. Justice Story held that a damage by grounding by the ebbing of the tide was a loss by perils of the sea.

It is sometimes said that by the phrase "sea perils" is meant extraordinary action of the sea, but there are few cases in which *extraordinary* is defined in this sense.

In *Bullard* v. *The Roger Williams Insurance Co.*, 1 Curtis 148, an action was brought on a policy of marine insurance on the brig *Star* at and from Fall River to Havana and thence to a northern port in the United States. The vessel proceeded to Havana, took on board a cargo of molasses and sailed on her return voyage. Soon after leaving Havana she met the cross sea, which is ordinarily thrown up in the Florida Straits by the meeting of the trade wind and the Gulf Stream. She sprung a leak, which increased, and she was obliged to put in to Key West. It was found that it would cost more to repair her than she was worth, and surveyors recommended a sale. The plaintiffs sued as for a total loss. In his charge to the jury, Mr. Justice Curtis said:

"It has been stated by the defendants' counsel, that the law requires all vessels to be so strong as to resist the ordinary action of the sea, in the voyages for which they are insured. This is true. It is also said, and you will judge whether it is sat-

isfactorily shown, that a cross sea is ordinarily to be expected to be met with, in the Florida gulf stream, and that if this vessel broke down in such a sea, this is conclusive proof that she was not seaworthy for this particular voyage. But *I do not understand that the law requires vessels to be so strong as not to receive injury from any state of the winds and sea which may ordinarily be expected in the voyage for which she is insured.* This is not what is meant by the ordinary action of the winds and sea. In some sense, gales and heavy seas may be said to be ordinary. They are of very frequent occurrence in some parts of the world. A vessel going round Cape Horn, in the winter, scarcely fails to encounter them. But if damage is suffered by their action on the vessel, or cargo, it would certainly be no defence for the underwriter to say, that in that voyage they almost always occur, and the vessel should have been strong enough to resist them. Gales of wind and heavy cross seas are not the ordinary action of the sea, in the sense of the law of insurance, and *when injury is suffered by a seaworthy vessel from their action on her, she is damaged by a peril within the policy.* At the same time, if seaworthy vessels usually, and, so far as appears, always, go through such seas as are described by these witnesses to have existed on this passage, without sustaining material injury, it certainly tends to show that the injuries suffered by this vessel are to be ascribed, not to a peril of the sea, but to the insufficiency of this vessel. It is a matter of fact for your good sense to determine. The law raises no presumption concerning it, and, I apprehend, cannot safely do so. Because, when the winds and seas are not in their ordinary state, it is impossible to say, beforehand, what effects they will produce upon seaworthy vessels. One may get *an unlucky twist*, as seamen call it, and

be broken down, while another, under circumstances apparently no more favorable, receives no injury. And, therefore, there is no legal presumption to guide you; but you must consider and weigh the probabilities of the case."

Cf. Patrick v. *Hallett*, 1 Johns., 241, 246, 247.

In *Hooper* v. *Rathbone*, Taney, 519, the ship *A Cheeseborough* had loaded a cargo of wheat in bulk for Liverpool at Baltimore. The vessel was seaworthy and the stowage was proper. During the voyage rough, but not extraordinary weather was encountered. The pumps of the vessel became clogged with wheat. The ship put into St. Thomas for refuge.

A survey found that the wheat in places was musty and that in the wings it was wet with sea water, though the damage did not extend far into the bulk of the cargo. The discharge of the cargo was recommended.

It was found that part of the wheat had been lost by pumping, and that part of it was damaged by sea water and was so musty that it was deemed best for the interest of all concerned to have it sold at St. Thomas. The libel was filed to recover the value of the wheat which the vessel failed to deliver by reason of these facts. The bill of lading contained an exception of perils of the sea. The District Court found in favor of the libelants, but on appeal to the Circuit Court the decree was reversed and the libel dismissed by Chief Justice Taney. After describing the voyage and the disposition of the cargo in substantially the manner just given the Chief Justice said:

"It is true, that the storm was not violent enough to dismast her or to carry away her sails; but the evidence shows that it blew heavily, that the sea was rough, and that the vessel was rolling and pitching in it, before any inconvenience was experienced from the wheat in the pumps.

"There is not the slightest evidence that the ship was strained by carrying too much sail in heavy weather; and the proof is positive and uncontradicted, that the bin was constructed by one of the most experienced shipjoiners in Baltimore. and was examined by him and the master of the vessel before the wheat was put in, and found to be without fault; and their judgment is confirmed upon the survey made at St. Thomas after the wheat was unladen, and the construction of the bin examined by the surveyors and the proof is equally positive and uncontradicted, in relation to the sufficiency, and indeed, the excellency of her pumps.

"Now trying this case upon the testimony before the court, the conclusion is inevitable, that the loss was occasioned by the perils of the sea; for the ship is proved to have been among the strongest ever built in Baltimore; and *if the bin was properly constructed, the pumps properly arranged, the vessel seaworthy, and there was no negligence or misconduct of the master in navigating her, there is nothing but the perils of the sea to which the disaster can be imputed.*

"No doubt a vessel laden with wheat in bulk is more liable to sea-damage than with some other cargo; and she may be disabled from proceeding on her voyage by encountering winds and waves, through which a different cargo might pass without injury to the vessel or cargo. But it is not suggested that vessels of a different description from this, or differently fitted out, or differently

laden, are required to transport wheat in bulk. *And if there was no fault in the ship, or in her equipments, or in the stowing of the cargo, or in the manner in which she was navigated; and if every precaution was taken, which is usual and customary in transporting such a cargo, I see no ground upon which the ship-owners can be charged with the loss.*"

Though this decision was not before Judge Thomas his opinion was based on almost identical grounds. *Ante*, pp. 8-11; 143 Fed Rep., at p. 637.

The district judge rightly held, in this case, that damage to the rice by sea water entering a seaworthy ship without the fault of the ship or her crew was within the broad language of this exception.

The meaning of the words "a loss by a danger or accident of the seas or of navigation," or "by a peril of the sea," is the same in a bill of lading as in a policy of insurance on goods. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, while negligence contributing to the loss would not be a defense to an underwriter, but this result does not flow from any different meaning of the same words occurring in two maritime instruments. *The G. R. Booth*, 171 U. S., 450, 459.

In the present case the loss would be "an accident of the seas or of navigation," whether the words appear in a policy or in a bill of lading.

These propositions appear to be established by the cases of *Hibernia Insurance Co.* v. *St. Louis*

Transportation Co., 120 U. S., 166, and the *G. R. Booth, supra.* They are also supported by *The Xantho,* 12 App. Cas., 503; *Hamilton* v. *Pandorff,* 16 Q. B. D., 633; 12 App. Cas., 518; *Blackburn* v. *Liverpool, Brazil & River Plate St. Nav. Co.* [1902], 1 K. B., 290: *The Southgate* [1893], Prob., 329; *The Cressington* [1891], Prob., 152; *The Glendarroch* [1894], Prob., 226; *The Exe,* 57 Fed. Rep., 886; *The Castleventry,* 69 Fed., 475 *note; Davidson* v. *Bernand,* L. R., 4 C. P., 117, 122.

In *The Xantho, supra,* the question was whether the owners of the steamer's cargo could recover from the shipowners their damages sustained by the sinking of the vessel in a collision. The bill of lading contained an exception of "*dangers and accidents of the sea.*"

The course of the case to the House of Lords was peculiar. The plaintiffs proved shipment, and the loss of their cargo by reason of the collision, but adduced no evidence of fault on the part of the *Xantho.* The defendants then proved the exception of "dangers and accidents of the seas" contained in the bill of lading and rested. They offered no evidence to show that the *Xantho* was free from fault, or that the other vessel was exclusively in fault, because *Woodley* v. *Michell,* 11 Q. B. D., 47, had decided that damage to cargo caused by a collision due to another vessel's fault was not a peril of the sea, and that decision was binding on the Court of Admiralty. On this state of the proofs, the Admiralty Divis-

ion held the loss was not "a danger and accident of the sea," and this decision was affirmed in the Court of Appeal.

The question before the House of Lords was virtually two-fold, (1), whether *Woodley* v. *Michell* was rightly decided; and (2), whether the Court could determine that the loss was "a sea peril loss," *without knowing which ship was in fault for the collision. The record did not present the further question whether the owners of the Xantho were relieved from liability by the exception,* and therefore the House of Lords refrained from expressing any opinion on that point. *It dealt exclusively with the character of the loss,* and whether or not it was within the language of the exception.

The Court overruled *Woodley* v. *Michell,* and held that damage caused by the inflow of sea water through a hole made in the ship's side by collision was "a danger and accident of the sea" within the exception; but left open the question whether the shipowners were entitled or disentitled to the benefit of the exception.

Lord Herschell, at p. 508, said:

"The question, what comes within the term *perils of the sea* (and certainly the words *dangers and accidents of the sea* cannot have a *narrower* interpretation), has been more frequently the subject of decision in the case of marine policies than of bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter.

"I think it clear that the term *perils of the sea* does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. * * *

"It was contended that these losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question that, if a vessel strikes a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler*, 5 M. & S., 461, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the Court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases.

"But it is said that the words, *perils of the sea*, occurring in a bill of lading, or other contract of carriage, must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, whilst in the former you may go behind the *causa proxima* and look at what was the real or efficient cause. * * * Now I quite agree that in the case of a marine

policy, the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there has been a loss by such perils. *But I do not think this difference arises from the words 'perils of the sea' having a different meaning in the two instruments, but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception.* It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments."

Lord Bramwell, at p. 513, said:

"Was it by a peril of the sea that the defendants' ship foundered? The facts are that the sea water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does.

"It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should

they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case, and not in the other?

"The argument is that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without light. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, 'I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea.'

"The Court of Appeals, with great respect, argued as though the collision caused the loss. So it did in a sense. It was a *causa sine qua non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, 'Oh, the loss is not by perils of the seas, but by bad carpentering.' Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship. All I say is, that the loss would be by perils of the seas."

In *Hamilton* v. *Pandorff*, *supra*, the question

was whether damage to rice by sea water, which entered the ship through a hole gnawed in a lead pipe by rats was "*a danger or accident of the sea*," within an exception in the bill of lading. The Court held it was, and on a finding of the absence of negligence absolved the shipowners from liability.

Lopes, *J.*, in the Queen's Bench Division, held that the damage was within the exception of dangers and accidents of the seas, and that the shipowner was not responsible. In the course of the opinion, 16 Q. B. D., p. 633, he said:

"In a seaworthy ship, damage to goods, caused by the action of the seas during transit, not attributable to the fault of anybody, is, in my opinion, 'a danger or accident of the sea' intended to come within the exception and exonerate the shipowner. It is clear that the action of the sea itself is one of the causes contemplated."

At p. 635, he said:

"I think a loss arising from some inevitable accident at sea whereby sea water enters the ship and damages goods is 'a danger or accident of the seas' within the exception. It seems to me, that where the effective cause is beyond human control, and in consequence salt water enters which damages goods it is 'an accident of the sea' within the meaning of the contract of affreightment and the true intention of the parties. Here, it is the sea damage occurring at sea and nobody's fault. I think the defendants have brought themselves within the exception."

This judgment was reversed by the Court of

Appeals, 17 Q. B. D., 670, but it was afterwards re-instated by the House of Lords.

Lord Halsbury, L. C., at pp. 522, 523, 524, said:

"My Lords, in this case the admissions made at the trial reduce the question to this: Whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea water to come in and cause damage is a danger and accident of the sea. *That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but, in my judgment, has no relevancy to the question whether the facts as I have stated them constituted a danger or accident of the sea.* * * *

"Some effect must be given to the words *perils of the sea.* A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury*, 8 Ex. 166; 22 L. J. (Ex.) 2. In the Law Journal report of that case Pollock, C. B., and Alderson, B., distinctly pointed out, after the judgment of the Court had been given, that the decision at which the Court had arrived did not touch the question of whether the sea let in by a hole made by a rat was an accident or danger of the sea. *One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water from the sea getting into the vessel [from the sea]* upon which the vessel was to sail in accomplishing her voyage.* It would not necessarily be by a storm; the parties have not so limited the language of the contract. It might be by striking on a rock, or by excessive heat so as to open some of the upper timbers. These and many more con-

tingencies that might be suggested would let the sea in, but *what the parties, I think, contemplated was that* [*if*]* *any accident not wear and tear, or natural decay should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract.*

"A subtle analysis of all the events which led up to, and in that sense *caused* a thing, may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal rights of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed, each of these may be represented as the cause of the water entering, but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

"In the class of contract *where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them*, but because in those cases an additional term exists in the contract which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to

*The words in brackets though omitted, apparently by error, from the official report, appear in the report contained in 5 Aspinall, N. S., 212, 213.

the words *dangers and accidents* of the seas

* * *

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case *it was a danger, accident or peril, in the contemplation of both parties, that the sea might get in and spoil the rice.* I cannot think it was less such a peril or accident, because the hole through which the sea came was made by vermin from within the vessel, and not by a sword fish from without—the sea water did get in."

Lord Watson at p. 525, said:

"If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of the mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage.

"Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression 'dangers and accidents of the sea,' different from

that which it bears in a contract insuring cargo against sea risks; that in a case of a charter-party or bill of lading, the Court ought to look to what has been termed the remote, as distinguished from the proximate cause of damage; whereas, in the case of a policy the proximate cause can alone be regarded. *The expression has precisely the same significance in both cases; but there is this difference between them, that when a shipowner, who is bound by the implied terms of the contract to carry with ordinary care, claims the benefit of the exception, the Court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner, or of those for whom he is responsible.* * * * I am of opinion that the appellants must prevail, *because it has not been shown that the peril, which was the immediate and efficient cause of damage, owed its existence to their negligence.*"

In the *Southgate* 1893, Prob. 329, the entrance of water during the loading of cargo, through an overboard delivery valve, connected with the circulating pump, which the engineer properly opened, but neglected to close, was held to be a loss by "*a danger and accident of the seas or other waters,*" as well as "*an accident of navigation,*" within the meaning of an exception in a bill of lading.

In the *Cressington* 1891, Prob. 152, the exception in the bill of lading was of: "Perils of the sea * * * and other *accidents of navigation,* even when occasioned by the negligence * * * of the * * * master." During the voyage a rivet in the foot of a bulkwark stanchion worked

loose, and through the leak thereby occasioned the cargo was damaged by sea water. After the weather improved, the master negligently omitted to take sufficient steps to stop the leak, and the cargo was further damaged by sea water. Owing to the dunnage of the waterways in the 'tween-decks being insufficient to allow the water coming from the leak to escape to the bilges, the cargo in the lower hold was still further damaged. It was *held* that the shipowner relieved from liability by the exceptions.

Sir James Hannen, President (at p. 160), said:

"The first question is whether the *prima facie* liability of the shipowner for the damage which arose to the cargo is removed by the exception contained in the clause. The learned judge in the Court below appears to have thought that the original source of damage was not attributed to the shipowner, but that he was liable to this extent, that when the damage was discovered to have arisen, the master did not make use of such means as were in his power to prevent the continuance of the leakage, and that that was not within the exception. We are of opinion that that is not so. *The mischief arose from the inflow of water in the course of navigation, and that, in our judgment, is a peril of the sea and an accident of navigation.* The clause, however, goes on to say, 'perils of the sea and accidents of navigation, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.' It appears to us from these words in the clause that the alleged negligence on the part of the master was peculiarly such an accident of navigation as it was intended to guard against."

A similar ruling was made by the Circuit Court of Appeal of the Second Circuit, in *The Exe*, 57 Fed. Rep., 886.

In the *Glendarroch* [1894 Prob.], 226, the plaintiff s brought an action against the owners of the *Glendarroch* for non-delivery of goods shipped under a bill of lading containing the usual exceptions, but not excepting negligence. The goods had been damaged by sea water, through the stranding of the vessel, and the defendants claimed exemption from liability on the ground that the loss was occasioned by perils of the sea.

The President, Sir F. H. Juene, ruled that in order to excuse themselves from the damage to the goods, it lay on the defendants to show not only a peril of the sea, but *a peril of the sea not occasioned by their negligence.* It was held by the Court of Appeal (Lord Esher M. R., Lopes and Davey, L. JJ.) reversing the decision, that the loss fell within the exception, and that the burden of showing that the defendants were not entitled to the benefit of it, by reason of negligence, lay upon the plaintiffs. Such is the rule in this Court. *Cau* v. *Texas & Pacific Railway Co.*, 194 U. S., 427.

The most recent and instructive case on the subject is *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.*, 1902, 1 K. B., 290. The steamship *Tropic* brought a cargo of sugar to the port of New York. When the vessel was outside Sandy Hook the chief engineer opened the sea

cock to admit sea water into a ballast tank. By a mistake, which the Court said was probably an act of negligence, the engineer opened another valve by which the sea water was let into one of the holds The ship was then no longer tight, although, as the Court said, when the sea cock only had been opened, the cargo spaces of the vessel still remained perfectly tight. The bill of lading contained an exception of "*perils of the sea or of navigation,*" even though caused by the negligence of the vessel's officers. The Court found that the entrance of sea water into the hold in this manner was a peril of the sea, and that as the exemption from the act of negligence which occasioned the peril was valid and binding, the ship was relieved from liability for the loss by the exception.

Mr. Justice Walton, in dealing with the nature of the damage, said at p. 293:

"The plaintiffs in this action seek to recover that amount, and say that they are entitled to recover that sum as damages, because the shipowners were bound by their contract to carry and deliver the cargo safely and failed to do so. The defendants, on the other hand, contend that the obligation to carry and deliver the cargo safely is subject to the exceptions contained in the bill of lading, among which there is an exception in respect of 'loss or damage resulting from any of the following perils (whether arising from the negligence, default, or error in judgment of the * * * engineers * * * or otherwise howsoever), * * * or other peril of the seas, rivers, or navigation of whatever nature or kind soever.' The shipowners say that they are exempt because the case comes within that exception.

"Numerous cases have been cited, but I think that the law upon this question has really been cleared up and established by the three cases in the House of Lords: *Thames and Mersey Marine Insurance Co.* v. *Hamilton*, 12 App. Cas., 484; *The Xantho*, 12 App. Cas., 503; and *Hamilton* v. *Pandorf*, 12 App. Cas., 518, of which I think that *Hamilton* v. *Pandorf*, 12 App. Cas., 518, is the example most applicable to the present case.

"It is to be noticed that in those three cases no question arose with regard to a negligence clause, for in those cases the shipowner was not exempt from liability for damage arising from negligence of the crew.

"As I understand the law, where there is not a negligence clause, the shipowner is bound absolutely to deliver the goods safely, subject to the exception of perils of the seas and any other exceptions contained in the bill of lading. If he fails to carry the goods safely, but the loss is occasioned by one of the excepted perils, then *prima facie* he is not liable. In the cases before *Hamilton* v. *Pandorf*, 12 App. Cas., 518, the contract of the shipowner was not only to carry the goods safely, subject to the excepted perils, but, further, to use all due care and diligence to deliver safely, and, therefore, the exceptions relieved him from his absolute obligation, but not from the obligation to use due care and diligence, if there was no diligence clause. If the shipowner failed to use due care and diligence, though he was exempt by the exception from his absolute obligation, yet he was not exempt from liability for breach of his contract to use due care and diligence, if there was no negligence clause; and, therefore, if a loss was occasioned by want of due care and diligence, the shipowner was liable even if the loss was occasioned by an excepted peril.

"In the present case there is what is called a negligence clause, and the shipowner is exempt from liability for loss occasioned by peril of the seas though caused by negligence, and, therefore, we have not to consider the liability for want of due care and diligence.

"The only question is whether the loss was occasioned by a 'peril of the seas or navigation.' If it was, then the shipowner is protected by the exception, although the loss was caused by the negligence of his servant. Therefore, we have not really to consider what is a fault or error of navigation, but only whether the loss was occasioned by a peril of the seas or navigation. Now, it is perfectly true, as was pointed out by counsel for the plaintiffs, that, to bring the case within the exception, there must in the first place be an accident, by which I understand that the loss must be something which *might*, and not necessarily *must*, follow. That was pointed out by Lord Halsbury, L. C., in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, 524, where he said: 'I think the idea of something fortuitous and unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through seas. 'Therefore, things which must necessarily happen cannot be perils of the seas. Then, it must be not only an accident, but an accident of the seas, as was pointed out by Lord Herschell in the *Xantho*, 12 App. Cas., 503, 509.

"It seems to me, however, to be a fallacy to say that because the loss was caused by mistake or neglect on the part of a servant it was therefore not an accident. The loss was obviously a thing which *might*, but not necessarily *must*, hap-

pen. In the ordinary and proper sense, a damage arising from the negligence of a servant is an accident or casualty. It seems to me, then, that this loss did arise from an accident. Was it an accident of the seas? As I understand the judgments of the learned Lords in *Hamilton* v. *Pandorf*, 12 App. Cas., 518, and *The Xantho*, 12 App. Cas., 503, one of the perils of the seas is that, if the ship is not kept tight, the sea-water will come in. *If by some accident the ship is not kept tight and the water comes in and damages the cargo, that is damage by an accident or peril of the seas.*

"In my opinion, these considerations afford a simple answer to the question in this case. The engineer intentionally opened the sea-cock, but the vessel still remained perfectly tight. The sea-water could not come into the carrying part of the vessel, nor sink the vessel; it was the same as if the water had been let into the ballast tank, in which case the ship would have remained perfectly tight. That being the position of things, the engineer, entirely by a mistake which was probably an act of negligence, opened a valve by which the sea-water was let into the carrying part of the ship, and then the ship was no longer tight. The sea-water then damaged the cargo which was in the carrying part of the ship. I cannot distinguish this case from the case in which a port was accidently left open by negligence and the sea-water was thereby let into the ship: *Carmichael* v. *Liverpool, &c., Indemnity Association*, 19 Q. B. D., 242. In either case an opening was made accidently by mistake, and the ship then ceased to be tight. *It seems to me that in either case the ship by negligence, by an accident, was exposed to the peril that, if the ship was not kept tight, the sea-water would come in and that is essentially a peril of the seas*, and a peril to which

every ship is exposed while she is afloat. The damage or loss occasioned by that peril is within the exception in the bill of lading, and the shipowner is exempt from liability. My judgment must, therefore, be for the defendants."

In *Thames & Mersey Marine Ins.* v. *Hamilton*, 12 App. Cas., 492, Lord Bramwell suggested the following definition of a sea peril under a policy of insurance: "Every incidental circumstance not the result of ordinary wear and tear, decay, or of the act of the assured, happening in the course of the navigation of a ship, and incidental to the navigation, and causing loss to the subject matter of the insured."

In *Davidson* v. *Bernand*, L. R. 4, C. P. 117, water was let into a ship by the negligence of the crew in leaving open a cock or a valve in the machinery, Brett, *J.*, in defining the character of the loss, said at p. 122:

"By reason of some cock being left open in the discharge pipe the water got into the ship and so damaged the cargo. If that was so, the water got in not by the happening of any ordinary occurrence in the ordinary course of a voyage, but by the accidental circumstance of some cock having been left open by the negligence of the crew. That is, in my opinion, sufficient to make the underwriter liable. The question is the same as it would have been if by the falling of a mast through the vessel, or other negligent act of the crew the vessel had sunk in deep water, and I think the loss sufficiently comes within the doctrine of one happening by a vis major, and is within the meaning of the policy a loss caused by the perils insured against."

In *The Ontario*, 37 Fed. Rep., 220, 225, Mr. Justice Brown, then District Judge, also approved the doctrine of the leading English cases. Referring to a passage in the case of the *Portsmouth*, 9 Wall., 682, he said:

"It will be observed here that the Court expressly repudiates a distinction formerly taken between bills of lading and policies of insurance, with regard to what shall be deemed a loss by a peril of the sea. This distinction has also been fully *exploded* by the House of Lords in England in the recent case of *Wilson* v. *Owners of The Xantho*, 6 Asp., 207, 12 App. Cas., 503; and *Hamilton* v. *Pandorff*, 6 Asp., 212, 12 App. Cas., 518, 525."

The conclusion to be drawn from the foregoing review of the authorities is that the question whether the incursion of sea water into a ship is a danger or accident of the sea is a question of fact. The authorities show that such inflow of sea water is considered within the definition of a danger or accident of the sea. Whether or not the shipowner will be protected against the consequences of such danger or accident is a question of law depending on the construction of the documents in connection with the circumstances of the case. Under settled legal principles the shipowner will be protected unless the danger or accident was shown to have been induced by his negligence. The certificate states that there was no negligence here.

The difference between the parties on this hearing is essentially one of definition.

The question which the court has certified, relates to the proximate cause of the damage. Was the damage by sea water which entered the ship under the circumstances stated, a loss resulting from a danger or accident of the sea or of navigation? It is unquestionable that the cause of the damage to the rice was sea water. The appellee maintains that such damage occurring during the voyage in a seaworthy ship, without the fault of the officers or crew, and not due to ordinary wear and tear, is "an *accident* of the seas, or of navigation." The appellants say that this argument confuses the condition of the cargo, with the cause of that condition. But as the condition of the cargo was a damaged condition, and the cause of the damage was sea water, the only remaining question to be determined is, whether the admission of the water into the ship was "an accident of the seas and of navigation."

The real claim of the appellants seems to be that though the accidental wetting of their cargo, by sea water, was the cause of their loss, yet the ship cannot be exonerated from such loss without showing the cause of that cause. Their argument on this branch of the case is, in effect, that which was rejected by Brown, *J.*, in *The Vaderland,* 18 F. R., 733. A consignment of telegraph wire had been damaged by rust, and the bill of lading contained an exception of "rust or corrosion." The shipper claimed that the cause of the rust was one for which the ship was not liable. The learned judge, at p. 740, said:

"The argument on the part of the importers, however, goes back of the fact of the oxidation or rusting of the wire, and insists that the burden of proof is upon the carriers to show what was the cause of that rusting, and that this cause was within the exceptions of the bill of lading, in order to clear them from liability. I cannot sustain this view of the case. It is enough for the carrier, in the first instance, to show that the damage itself was of the kind excepted in the bill of lading. The oxidation or rust, in this case, is of that character. It is not incumbent upon the carriers, therefore, in the first instance, to discover what it was that caused the rust, and then to show that that particular rust was through no fault of theirs."

In the cases of *The Giava*, 56 Fed. Rep. 243; *The Svend*, 1 Fed Rep. 54; *The Zone*, 2 Sprague, 19; *The Queen*, 78 Fed Rep. 155; 94 Fed. Rep. 180, and others of that class on which the appellants rely, the real question involved was not as to the nature or character of the loss, which, in each case, was damage by sea water, but whether the carrier had succeeded in satisfying the court that the inflow of the sea was not due, either to the unseaworthiness of the ship, or to some contributing fault on the part of his servants. We do not question the correctness of the doctrine enunciated in such cases, that where the damage arises from sea water, the carrier must satisfy the court that the ship was reasonably fit for the voyage, and that he has used due care to avoid damage to the cargo by sea water. The proper interpretation of all the cases of this class on which the appellants rely is, that the carrier

had not succeeded in satisfying the court that he had furnished a fit ship and had used due care to avoid the damage. None of those cases was primarily concerned with the question of the *character* of the damage, considered apart from the question of seaworthiness or of fault on the part of the carrier contributing to the damage.

The precise question here involved has not, so far as appears, been considered in any American case.

The appellants claim that the decision of the question certified should be controlled by the decision of this court in the *G. R. Booth*, 171 U. S., 450. It is true that the learned district judge who decided that case considered and determined it on the theory that the inflow of water without the ship's fault was, under the circumstances, a peril of the sea. 64 Fed. Rep., 878. But it appearing that the water which caused the damage came into the ship by reason of a defect in the side plating, caused by an explosion in the cargo, and without other intervening cause, this court held that "the case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was occasioned by the perils of the sea; or, in other words, whether it is the explosion or a peril of the sea that is to be considered as the proximate cause of the damage according to the familiar maxim, *causa proxima non remota spectatur*. 171 U. S., at pp. 452, 453. It was held that the explosion

was the proximate cause of the damage, and that as explosion was not a sea peril, nor an excepted peril, the steamship was liable for the loss. Beyond determining that the words "perils of the sea" have the same meaning in a bill of lading as in a policy of insurance, a ruling, which, as applied to the facts of this case, would, as we contend, mean that the loss was within the exception, *Davidson* v. *Bernand*, L. R., 4, C. P., 117, 122, the decision in the case of the *G. R. Booth* appears to have no bearing on this controversy.

The claim of the appellants that the steamer should not escape liability for the damage to the rice without proving, clearly and satisfactorily, the way in which the water entered the ship, is not based on any substantial ground.

The cause of the damage is expressly stated in the certificate to have been sea water. But as it does not appear how the water got in, the appellants contend that the case should be treated as one in which the carrier had not tried to offer any explanation of the damage. On this point the certificate is against them. It shows that not only the carrier's servants, but also competent surveyors, employed by the respective parties, endeavored by all possible means to ascertain and explain the manner in which the sea water might have entered the ship. The fact that they could not find any adequate explanation shows, as the District Judge found, *ante*, p. 9, that the ship did her full duty in trying to explain, but that the means by which the water entered could not be as-

certained or determined by the most diligent efforts. The certificate contains no suggestion that the carrier did not, in the utmost good faith, try to inform the libelants and the Court as to the cause of the damage and how it occurred.

No doubt it is the rule that where damage to cargo occurs and the carrier makes no effort to explain it, a presumption arises that it was due to his fault; but where, as the certificate shows, neither the officers nor competent surveyors, after a most careful examination could explain how the sea water which caused the damage could have entered the ship, nothing further in the way of explanation could reasonably be required. The inability of the officers and crew and of the surveyors to discover any defect by which the water might have entered the ship is proof that none existed; and if no defect existed in the vessel, and there was no negligence on the part of the crew, the entrance of sea water may fairly be claimed to be "a danger or accident of the sea, or of navigation," even though the precise manner in which the water entered cannot be stated.

In *The Mascotte,* 48 Fed. Rep., 119; 51 Fed. Rep., 605, on which the appellants rely, the vessel was held liable for a cargo loss which she could not explain, because the damage was caused by the staining and defacing of the packages, and there was no exception of losses of that kind in the bill of lading. The loss was not therefore, brought *prima facie* within any exception, and the carriers remained liable. The ground of liability was not the failure to explain the damage, but the

failure to show that it fell within an exception. In this case salt water damage to the rice is an accident of the sea or of navigation, and is, *prima facie*, within an exception, and as the shipper could not show that the loss was contributed to by negligence the ship should have the benefit of the exception.

It is not always necessary, in order to bring a loss within an exception of "dangers or accidents of the sea or of navigation," or within an insurance against "sea perils," to furnish a precise explanation of the manner in which the accident complained of has arisen. A familiar instance in which a carrier is relieved from an unexplained loss by sea perils, and an insurer is held liable for such a loss, is that of a seaworthy vessel which sails from her loading port, with a cargo, and disappears without ever being heard from. In such a case the insurer of the vessel or of the goods would be liable for the loss of the insured property by sea perils; and the same state of facts would afford a complete answer to an action against the carrier for the loss of the goods.

The true intent and purpose of the rule which ordinarily requires the carrier to give an explanation of damage to cargo, is to require him to furnish such information as he may possess, with regard to it, in order that the Court may be satisfied that the loss has not resulted from his negligence or from the unseaworthiness of the ship. Where, as in this case, it is found that a cargo damage has been caused by the entrance of sea

water into the ship, during the voyage, without the negligence of the ship's officers or crew, and that the ship was seaworthy for the voyage, a *prima facie* case of a loss by "a danger or accident of the seas or of navigation" is made out, and the reason of the rule is satisfied, even though in the special circumstances, neither the carrier nor the most expert of surveyors could determine how the water got in the ship. *See* opinion of Thomas, *J.*, *ante*, p. 11.

In the absence of any allegation of unseaworthiness by the shipper, or of any attempted proof of it, or of fault on the ship's part, the loss should be considered to be within the exception.

LAST POINT.

THE QUESTIONS CERTIFIED SHOULD BE ANSWERED IN THE AFFIRMATIVE.

January 20, 1909.

Respectfully submitted,

J. PARKER KIRLIN,
JOHN M. WOOLSEY,
CHARLES R. HICKOX,
Counsel for the *Folmina*.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 84.

GUSTAVE H. JAHN ET AL., LIBELLANTS,

vs.

STEAMSHIP FOLMINA, WILLIAM VAN EYKEN, CLAIMANT.

Libellants' Memorandum of Additional Authorities Opposing Carrier's Contentions.

1. The Folmina's brief takes no account of the fact that the protection of cargo interests against the evasion of liability by carriers is a part of the policy of this country.

a. Attempts to apply foreign law to negligence clauses:
Liverpool Steam. Co. v. Phenix Ins. Co., 129 U. S., 397, 447.

b. Cargo owner's risk clause:
Compania la Flecha v. Brauer, 168 U. S., 104, 123.

c. Limit of liability:
The Majestic, 166 U. S., 375, 386.
Calderon v. Atlas S. S. Co., 170 U. S., 272, 282.
The Kensington, 183 U. S., 263, 274.

d. Latent defect clauses:
The Carib Prince, 170 U. S., 655.

e. Carrier's exoneration ineffective where liability asserted through a third party:
Erie R. R. Co. v. Erie Transp. Co., 204 U. S., 220, 226.
The Chattahoochee, 173 U. S., 540, 549.

f. Doubtful cases under the Harter act:
The Delaware, 161 U. S., 459, 470.
The Irrawaddy, 171 U. S., 187.
Int. Nav. Co. v. Farr & Bailey, 181 U. S., 218.
Knott v. Botany Mills, 179 U. S., 69.
The Germanic, 196 U. S., 589.

2. Folmina's Brief, page 5. If it were to be assumed that the Circuit Court of Appeals intended to make a finding of actual seaworthiness, actual freedom from fault, etc., it would follow that sea water could not have entered. Yet it did enter. Only one out of the four judges below has adopted the sweat theory of damage. That theory is eliminated from consideration here.

3. Folmina's Brief, pp. 8-11, 52. The attempt to discredit the findings of the Circuit Court of Appeals by invoking those of the district judge is incomprehensible. It seems improper for us to point out to this court the numerous circumstances in the record that seem wholly inconsistent with the favorable opinion of the probative value of the testimony of the ship's officers, which the district judge apparently entertained.

4. Folmina's Brief, p. 14. *Hamilton v. Pandorf* and other English cases do not relieve the carrier upon a showing of sea-water damage to cargo where there is *no evidence* of fault or unseaworthiness; but where the evidence does show care and seaworthiness and satisfactorily explains how the sea water entered.

Moreover, in England a wholly different policy is pursued from our own in dealing with relations between carrier and cargo.

(*a*) *Liverpool Steam Co. v. Phœnix Ins. Co.,* 129 U. S., 397.

The Cressington [1891], Prob., 152, 160.

(*b*) *The Irrawaddy,* 171 U. S., 187.

Erie R. R. v. Erie Transp. Co., 204 U. S., 220, 226.

Milburn v. Jamaica Trading Co. [1900], 2 Q. B., 540.

5. Folmina's Brief, p. 17. Although a carrier cannot avail himself of the Harter Act without first showing diligence to make seaworthy, there is no such condition precedent to invoking the protection of valid exceptions in the bill of lading. He must merely show a loss within the excepted peril, and not *due to* unseaworthiness.

Hibernia Ins. Co. v. St. Louis Transp. Co., 120 U. S., 166.

The Caledonia, 157 U. S., 124, 132, 136.

6. Folmina's Brief, page 17, bottom. The only question before this court is whether the loss is within the "sea peril" exception. This question was never decided by the Circuit Court of Appeals in favor of the shipowner, Judge Lacombe and Judge Coxe adhering to the rule in *The Patria,* 132 Fed., 971. The decision of Judge Thomas was founded on a mistake—that of supposing that there was an "*express*" "sea *water*" exception in the bill of lading. 153 Fed., 365.

7. Folmina's Brief, page 18. The determination of the *onus probandi* (and consequently of the proper inferences to be drawn from failure of proof) is a question of law. Even had a state of actual seaworthiness been certified in the present case, this court would have been at liberty to disregard it if the certificate showed that actual seaworthi-

ness was merely the *inference* of the lower court upon insufficient evidence.

The Edwin I. Morrison, 153 U. S., 199, 207, 215, 216.
The Southwark, 191 U. S., 1, 13.

8. Folmina's Brief, pages 20-25. The phrase, "dangers and accidents of the seas and of navigation," means no more than "perils of the seas."

Carver, Carriage by Sea, sec. 84.
The G. R. Booth, 171 U. S., 450, 452, 458.

A sea peril is something "peculiar" to the seas; it does not include injury to a vessel by worms.

Garrison v. Memphis Ins. Co., 19 How., 312, 314, 315.
Cf. *Merchants' Trading Co. v. Universal Marine Ins. Co.*, 2 Asp. M. C., 431.
Dudgeon v. Pembroke, L. R., 9; Q. B., 581, 596.
The Chasca, L. R., 4; Ad. & Ecc., 446.

9. Folmina's Brief, p. 25. A sudden unexplained disaster to a ship soon after sailing is not ordinarily attributed to a sea peril.

The Southwark, 191 U. S., 1.

10. Folmina's Brief, p. 47. The use made of *Davidson v. Bernand*, L. R., 4 C. P., 117, seems misleading. Under the decision, liability was not based upon the "sea peril" phrase of the insurance policy sued on, but on the words "and all *other* perils, dangers, and misfortunes," etc. This is made particularly clear in the judgment of Willes and Keating, JJ.

11. Folmina's Brief, p. 49. The "rust" exception, like those of "decay" and "breakage," protects the carrier against natural deterioration and possible bad packing of cargo. On these matters the shipper would be in a better position to offer explanatory evidence than the carrier. The carrier

would have no similar need for a "sea-water damage" exception. There is no ground for construing a "sea-peril" exception as a "sea-water damage" exception. The same judge who decided *The Vaderland*, 18 Fed., 733 (here relied on by the carrier), decided also *The Lennox*, 90 Fed., 308, 309.

If carriers should hereafter adopt a "sea-water damage" exception, it should be held void as being unreasonable.

Inman v. South Carolina Ry. Co., 129 U. S., 128.

12. Folmina's Brief, page 50, admits carrier's duty to show the ship's reasonable fitness for the voyage, and the use of due care to avoid damage. Testimony by the master of "*general good condition*" (the certificate) is inadequate to show the former.

The Edwin I. Morrison, 153 U. S., 199, 212, 215.

Even were there a presumption of seaworthiness arising from the evidence in other respects (which there is not), the unexplained entrance of sea water into the Folmina's hold would rebut it.

Richelieu Nav. Co. v. Boston Ins. Co., 136 U. S., 408, 428.

Neither seaworthiness nor due care can be duly shown without explaining how sea water entered the Folmina.

13. Folmina's Brief, page 51—reference to *The G. R. Booth:* Unseaworthiness *resulting* from the disaster in question is never material. The only question is whether unseaworthiness preceded and caused the disaster.

14. Folmina's Brief, page 52. Among the grounds (said to be unsubstantial) for requiring a clear and satisfactory explanation of the cause of damage are the decisions of this court in:

Howland v. Greenway, 22 How., 491, 502.
The Edwin I. Morrison, 153 U. S., 199, 210, 211.
The Majestic, 166 U. S., 375, 386.
The Southwark, 191 U. S., 1, 15, 16.
Cf. *The Reeside*, 2 Sumn., 567, 575 (Story, J.).

15. The Folmina's Brief refers to a considerable number of actions on policies of *marine insurance,* in which the entrance of sea water was treated as a sea peril. They do not decide that sea water is *of itself* a sea peril; but in these cases the entrance of sea water was regarded as tantamount to a sea peril, because a sea peril was properly inferred. The inference was proper, because the assured owes to the underwriter no duty of care. The *meaning* of "sea peril" is the same in an insurance policy and in a bill of lading, but the character of evidence necessary to raise the inference that there has been a sea peril is different.

Respectfully submitted,

FREDERICK M. BROWN,
Advocate for Libellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

The Steamship "FOLMINA,"
WILLIAM VAN EYKEN,
Claimant-Petitioner,

AGAINST

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS composing the firm of GUSTAVE A. JAHN & Co.,
Libelants-Respondents.

Notice of Application for Writ of Certiorari.

SIRS:

Please take notice that the annexed petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit will be presented to the Supreme Court of the United States on Monday, March 2, 1908, at the opening of court at twelve o'clock noon, or so soon thereafter as counsel can be heard.

New York, February 10, 1907.

Yours, etc.,
CONVERS & KIRLIN,
Proctors for Petitioner.

To Messrs. WALLACE, BUTLER & BROWN,
Proctors for Respondents.

SUPREME COURT OF THE UNITED STATES.

The Steamship "FOLMINA,"
WILLIAM VAN EYKEN,
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AGAINST

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS composing the firm of GUSTAVE A. JAHN & Co.,
Libelants-Respondents.

Petition for Writ of Certiorari.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The petition of William Van Eyken, claimant of the steamship *Folmina*, respectfully shows unto this Court as follows:

1. This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to require that the whole record in this cause be sent up to this Court for its consideration. A certificate has been sent to this Court by the said Circuit Court of Appeals asking the instruction of this Court on certain questions of law arising in the cause. The certificate is No. 313 on the Docket of this Court for the present term.

The petitioner is advised and believes that his rights and interest will be prejudiced by a decision on the certificate alone, for the reasons that the certificate is incomplete in its statement of facts; that the facts stated in it are the findings of a

divided court, and are at variance with the real facts as found by one of the Judges of the Court of Appeals, and as the District Judge apparently thought they existed; that the certificate is apparently framed with the view of asking the judgment of this Court on a previous decision of the Court of Appeals in another case, fol. 2451, bearing on a single aspect of this case, instead of requesting the opinion of the Court on all the important questions involved; and that an important question of law arising on a defence interposed under the Harter Act, on which the petitioner relied, is not included in the certificate, or in the questions to be answered.

2. The libel was brought in the District Court for the Eastern District of New York to recover for alleged damage to part of a shipment of 11,200 bags of rice carried in No. 3 hold on board the steamship *Folmina* from Kobe, Japan, to New York City in the early part of 1901.

The District Court dismissed the libel. *Record,* p. 580, 143 Fed. Rep., 636. The Circuit Court of Appeals first affirmed this decision, *Record,* p. 593, 153 Fed. Rep., 364, but later withdrew its mandate to the lower Court and made the certificate to this Court to which reference has just been made. *Record,* p. 615.

3. The proceedings in the Court of Appeals were these:

The appeal was taken by the libelants from a decree of the District Court for the Eastern District of New York, dismissing the libel with costs,

fols. 2344, 2350, entered in pursuance of an opinion by Judge Thomas. *Record*, pp. 580-585, 143 Fed. Rep., 636.

The Circuit Court of Appeals after due deliberation by a vote of two judges to one affirmed the decree, in an opinion filed March 26, 1907. Fols. 2383, 2384, 153 Fed. Rep., 364.

A decree of affirmance was entered in the Circuit Court of Appeals on April 5, 1907, providing that a mandate issue to the District Court in accordance with it. Fols. 2385-2388.

A mandate in usual form reciting the decree of the Court of Appeals and commanding the District Court to dismiss the libel was sent by the Clerk of the Court of Appeals to the proctors for the *Folmina* on April 8, 1907.

Thereafter and before the mandate was filed in the District Court, the proctors for the libelants-appellants filed on April 9, 1907, a petition for a rehearing in the Circuit Court of Appeals, praying in the alternative that, if a rehearing were denied, certain questions of law be certified by the Court of Appeals to this Court. Fols. 2393-2447.

On receipt of this petition the Court of Appeals through its Clerk communicated with the proctors for the *Folmina*, and ordered them to return the mandate which had been given to them. This order was complied with.

The Court of Appeals on April 16, 1907, in a short memorandum, granted the petition to the extent of allowing a reargument on the form of certificate to be sent to this Court for the pur-

pose of inquiring, in effect, whether the rule of decision announced in the case of *The Patria*, 132 Fed., 971, is correct. Fols. 2450-2451.

On April 26, 1907, an order was entered by the Court in the Circuit Court of Appeals formally recalling the mandate and vacating the order of affirmance previously entered.

On April 29, 1907, the date named by the Court, a reargument was had on the form of certificate to be sent to this Court. Counsel for the respective parties had been unable to agree on a certificate and, therefore, proposed certificates were submitted in behalf of both parties to the Court.

On May 7, 1907, a certificate in the form printed in the certified record submitted with this application, fols. 2457-2467, was forwarded to this Court. Fol. 2468.

This certificate differed from both the certificates submitted, but in its more important aspects is substantially like that submitted at the reargument by the proctors for the libelants-appellants.

This petitioner submits that the certificate as it now stands denies to him certain findings to which, by the evidence adduced and according to the opinions of both of the Courts below, he is rightly entitled, and fails to state one of the important questions of law involved.

4. There are three reasons for this application.

a. The first reason is that the Circuit Court of Appeals fails to find clearly as a fact in its

certificate that the *Folmina* was in all respects seaworthy at all stages of the adventure involved herein. The failure to insert such a finding amounts, it is submitted, to a denial of a right to which the steamship is entitled. No reargument was had on the question of seaworthiness. The two judges of the Court of Appeals who voted prior to the granting of the certificate to affirm the District Court's dismissal of the libel must necessarily have based their decisions on such a finding, because the *Folmina* has been shown by the evidence, as the District Judge said, "to have been absolutely seaworthy at every stage of the adventure," fol. 2337, and because without such a finding, express or implied, the bill of lading exceptions would not have been operative.

b. The second reason is that the Court of Appeals has failed to propound to this Court the question whether on the facts the exceptions contained in the third section of the Harter Act would not operate to exonerate the *Folmina*. The Harter Act has been invoked by the steamship throughout the litigation, and counsel for the petitioner in the form of certificate proposed by them suggested that one of the questions certified to this Court should be whether the steamship was not relieved from liability by the provisions of that Act.

c. The third reason for this application is that there is a very close and seriously contested question of fact as to whether the damage complained of was due to sea water or to sweat. As

to this the District Judge and the three Circuit Judges who have had this case under consideration are by no means in accord. The District Judge inclined to the theory that the damage was sweat damage, fols. 2333-2335, but considered a decision of the question unnecessary, fol. 2335, as in his opinion the bill of lading exceptions were a defence to the vessel under a finding either of sweat or sea water. Fol. 2336. One of the Circuit Judges has found that the damage was due to sweat. Fol. 2382. There is, therefore, no concurrent finding of fact in the lower courts by which this Court might feel itself bound.

These points will now be discussed in the above order.

5. The certificate should have contained a more clear and definite finding of seaworthiness.

After recapitulating various dry docking, surveys and repairs undergone by the *Folmina*, including a dry docking just previous to sailing for Japan on the voyage to the East, the homeward part of which is here in question, fol. 2463, and after stating that competent and experienced surveyors who examined the *Folmina* for both parties during and after the delivery of the rice cargo in question were unable to find any leaks in the hull, side-plating or rivets, fol. 2464, the statement of facts in the certificate concludes:

"No adequate means of access of sea water were found, nor any defect in the steamer which *then* appeared to be seaworthy." Fol. 2465.

This is the nearest approach in the findings of

fact to a finding of seaworthiness, and, if it be so considered, it is a finding of seaworthiness "during and after the delivery of the cargo," fol. 2463, not at the time the voyage commenced.

The questions of law asked of this Court at the end of the certificate are expressly based on the facts previously set forth. Fol. 2466.

In the first question the *Folmina* is referred to as "an apparently seaworthy ship." Fol. 2466.

The petitioner submits that in the findings of fact it is entitled on the record herein to a finding that the *Folmina* was seaworthy at all stages of the adventure in question.

She was not merely "apparently" seaworthy. She was shown to have been "seaworthy" by what the District Judge termed "the highest and most comprehensive proof." Fol. 2331.

The two judges of the Circuit Court of Appeals who voted to affirm the decree of the District Court dismissing the libel based their opinions on the fact that the bill of lading contained exceptions which exonerated the steamship. Fols. 2381, 2382. Their decisions must necessarily have been predicated on a finding of initial seaworthiness, for without it, under the decisions of this Court, bill of lading exceptions not within the limitations contained in Section 3 of the Harter Act, would have been nugatory. *The Edwin T. Morrison,* 153 U. S., 199, 210; *The Caledonia,* 157 U. S., 124, 137; *The Carib Prince,* 170 U. S., 661, 662. They voted to affirm a decision in a case in which the opinion

had been exceptionally emphatic in its finding of seaworthiness. Fols. 2332, 2337, 2338.

The District Judge in his opinion said, fols. 2328-2332:

"The rule that when the fact is in doubt, or the Court is in doubt as to the fact, the burden is on the carrier to solve the doubt, *has been fully met.* The carrier points to a sound ship, to which sea water could not gain access, and shows the existence of such condition during the voyage, and due preparation of the ship for the protection of the cargo, and ample care during the voyage. *Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect. Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permitting its existence are absent.* Immediately one suggests any practical way for sea water to enter, for instance around the scupper-pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet nor a strained plate justifies *even suspicion.* Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo disputes the possibility. Yet the libelants persist that the ship should, to free itself, make further disclosure. Why? *Conjecture even as to the cause has been exhausted, and the carrier to such limit has shown his innocence. Neither*

imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached."

Later in his opinion, fols. 2337, 2338, he said:

"In the present case the ship, from physical examination, appears to have been *absolutely seaworthy at every stage of the adventure.* To this it is answered that she was not seaworthy when and where the assumed sea water entered, and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her Eastern voyage, the inspection and care of the hold before the rice was loaded, *the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single suspicious condition appeared,* all this points to but one conclusion, that the owners or their agents used due care in sending her out from Japan, and the crew discovered no defect on the way, and *that no defect was discoverable. It does not seem just to condemn a ship with such a history."*

These findings of the District Judge which were thus affirmed by a majority of the Judges of the Court of Appeals in the opinion handed down before the granting of the certificate are fully sustained by the evidence.

The evidence of competent witnesses who were not impeached or contradicted showed:

a. That the *Folmina* was a steel steamship of the highest class in Lloyds' Register, fols. 1121, 1483, 1484, and at the beginning of the voyage was about two years old. Fol. 1483. She had been twice thoroughly examined in dry dock, once at Cardiff, fols. 1602, 1607, 1608, and again at New York, just before starting on the voyage to the far East where she loaded the rice in question. Fols. 1130, 1485. At New York she was surveyed in dry dock by Lloyds' surveyor and was then found to be tight, staunch and strong and in every way seaworthy and fitted for service as a cargo vessel. Fols. 1130, 1485, 1491.

b. That after dry docking the last time, she proceeded on a voyage from New York to Japan and on completion of the unloading at the close of that voyage, took on a full cargo for the return voyage, on which the damage here in question arose. Fols. 1485, 1490, 1491, 1492.

c. That the owner of the *Folmina* exercised due diligence to make the vessel herself in all respects seaworthy and properly manned, equipped and supplied and she was so at the beginning of the voyage from Japan towards New York. Fols. 1491, 2338.

d. That in the course of the return voyage the vessel experienced stormy weather, high seas, and wind of the force of from 9 to 11 on the Beaufort scale (including force 9, strong gale, force 10, whole gale, and force 11, stormy), during which the vessel rolled, pitched and strained heavily,

shipped heavy seas on deck and on one day suffered damage by the breaking of her rudder chain. Fols. 1502, 1507, 1517, 1518, 1521.

e. That careful soundings of the holds were taken regularly twice daily, but no water was found in any of the holds, fols. 1131, 1132, 1133, 1137, 1149, 1150, 1184, 1275, 1276, 1277, 1365, 1368, 1547, 1817, and no evidence of leaks was discovered in any part of the structure of the vessel or in any of the holds. Fols. 1132, 1272, 1273, 1276, 1277, 1363, 1364, 1365, 1548, 1816, 1817.

f. That it was not necessary at any time to pump out the No. 3 bilges and only about 5 buckets of water were found in them when they were cleaned at New York. Fols. 1150, 1273, 1279, 1364, 1817.

g. That no water entered the ship during the voyage through the hatches, decks or ventilators. Fols. 1122, 1128, 1129, 1131, 1132, 1159, 1178, 1194, 1259, 1363, 1364, 1480, 1843, 2244.

h. That there was no leak or break in any of the pipes of the vessel or around them by which water could have entered No. 3 hold. Fols. 82-86, 91-93, 452, 459, 1179, 1184, 1189, 1537, 1560-1562, 1843-1845, 1847, 1855, 1864, 1918-1920.

i. That there was no damage from wetting to the between deck cargo and no sign of dampness in the between decks. Fols. 481, 482, 1120-1122, 1128, 1145-1178, 1192, 1202, 1204, 1259, 1357, 1479, 1480, 1842-1844, 1918-1920, 2095, 2096, 2100, 2101, 2103, 2104, 2171, 2174, 2217, 2243.

j. That there was no damage in the upper tiers of cargo in the No. 3 lower hold, fols. 1114, 1205, 1206, 1948, 1949, 1987, 2105-2109, 2140-2142, 2195, 2219, and that there was no damage in the bottom tiers of the rice in No. 3 hold. Fols. 1214, 1218, 1219, 1360, 1361, 2177, 2215.

k. That during and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with the No. 3 hold and the *shell plating* of the steamer in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters, and that it was afterwards examined by competent and experienced surveyors representing both parties, including the principal surveyor to Lloyd's Register in the United States. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence was found which indicated that there had been any leaks in any part of the frame, structure, side-plating, riveting, pipes or appurtenances of the ship, through which sea water might have entered the No. 3 hold and caused the damage during any stage of the voyage. No leaks in the riveting or side plating or decks, or any part of the structure or appurtenances surrounding or connected with No. 3 hold existed when the hold was inspected preparatory to the loading of the cargo or at the time while it was being discharged from the hold, or at any time thereafter before the conclusion of the surveys that were made by the various

surveyors who examined the ship in behalf of the respective parties, as above mentioned. Fols. 82-88, 91-93, 102-109, 120, 400-402, 414, 416-420, 445-447, 452, 459, 475-476, 481, 482, 488-489, 493-499, 1120-1122, 1128, 1138, 1145-1178, 1179, 1184-1189, 1192, 1202-1204, 1229, 1230, 1248-1249, 1259, 1275, 1278-1280, 1357, 1364, 1370-1372, 1375-1376, 1479-1481, 1531-1538, 1552-1559, 1560-1562, 1759-1765, 1773-1775, 1805, 1842-1851, 1855-1864, 1868-1870, 1871-1876, 1897-1899, 1907-1911, 1916-1920, 1921-1922, 1925-1939, 2095-2096, 2100-2105, 2171, 2174, 2217, 2243.

l. That no repairs were made to the riveting, plating or any part of the sides or structure of the ship surrounding the No. 3 hold between the time of the shipment of the cargo in question, and the surveys above mentioned. Fols. 1248, 1249, 1375-1376, 1458-1462, 1536-1538, 1570-1572, 1597-1610, 1636, 1775, 1868-1870, 1876-1878, 1907, 1908, 1925-1927.

The conclusiveness of this testimony is admitted by the appellants' counsel in his petition for reargument. Fols. 2440, 2441.

He says, in asking the Court to send up a certificate in this case:

"The question of law that is presented in this case is, whether, in case of a vessel, not shown to be unseaworthy and not shown by affirmative evidence to be in any way in fault, sea water enters, such event shall be regarded as falling within the terms of the sea-peril clause of the bill of lading. The question is, whose risk is it,

that cargo should be damaged by sea water in some way *that no human being can explain?"*

The petitioner is advised and believes that in view of these facts and findings, the certificate as it stands at present is insufficient and deprives the petitioner of a right to which he was entitled, namely, an unequivocal finding of the seaworthiness of the *Folmina* at the commencement of the voyage with the cargo in question.

The Circuit Court of Appeals has asked this Court to define the scope of a certain exception in a bill of lading, but has not made findings of fact so definite as to make it certain that the exception would be operative.

As the certificate now stands, therefore, this Court may be brought into the dilemma of either having to dismiss the certificate because the Circuit Court of Appeals has failed to make a definite finding on an essential matter or of having to *infer* from the meager and incomplete facts stated whether or not the *Folmina* was seaworthy at the inception of the voyage.

The only escape from one of these two courses seems to be an examination of the record on which the certificate is based.

On the question of the operation of exceptions in a bill of lading, seaworthiness is a condition precedent. *The Caledonia,* 157 U. S., 124, 130, 137 and other cases cited above. And as this Court said in *International Navigation Company* v. *Farr and Bailey Manufacturing Company,* 181 U. S., 218, at page 224, approving and

quoting an observation of Lord Blackburn in *Steele v. State Line S. S. Co.*, L. R. 3 App. Cas., 72:

"The question whether a ship is reasonably fit to carry her cargo must be '*determined upon the whole circumstances and the whole evidence.*'"

That the seaworthiness of the *Folmina* should be so determined by this Court is the prayer that the petitioner here makes.

7. The petitioner was entitled to have certified to this Court the question whether, on the facts of this case, the *Folmina* was absolved from responsibility for the damage to the rice by the provisions of the third section of the Act of Congress, approved February 13, 1893, entitled "An Act relating to the Navigation of Vessels, &c." and commonly known as the Harter Act.

In case the ship owner has exercised due diligence to make the vessel in all respects seaworthy and properly manned and equipped the third section of the Harter Act relieves the carrier from liability for "losses arising from dangers of the sea."* Damage by sea water or by sweat is a

*Act of Congress, February 13, 1893. Section 3. "If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, or owners, agent, or charterers shall become or be

danger of the seas in such circumstances. *Clark* v. *Barnwell*, 12 How., 272, 282; *The G. R. Booth*, 171 U. S., 450, 459, 460; *Hooper* v. *Rathbone*, Taney, 519, also reported, 12 Fed. Cas., 1275; *The Viscount*, 11 Fed., 168; *Blackburn* v. *Liverpool, etc., Navigation Co.* (1902), 1 K. B., 290; *The Xantho*, 12 App. Cas., 503; *Hamilton* v. *Pandorf*, 12 App. Cas., 518.

The exemption from dangers of the seas is, therefore, a *statutory* exemption, the operation of which depends *on the exercise of due diligence* by the ship owner in making the vessel seaworthy for her voyage, and not, as in the case of an exception not included in the statute, on an absolute warranty of seaworthiness. *The Carib Prince*, 170 U. S., 655, 661, 662.

Accordingly, it is submitted, that the Court of Appeals, if it was unwilling to make an explicit finding of initial seaworthiness, should have found as a fact that due diligence was used to make the

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held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Folmina seaworthy and then should have asked this Court whether, under the circumstances, the exceptions in the third section of the Harter Act exonerated the vessel from liability; or else it should have asked whether on the facts as found in its certificate due diligence could be predicated, and if so, whether the statutory exceptions afforded immunity.

As the certificate now stands, the applicability of the Harter Act is not in any way raised, and by reason of this omission the petitioner's rights may be, and in his opinion are, seriously prejudiced.

That the Harter Act affords an exemption to the steamship in this case has been the contention of the petitioner from the commencement of this litigation. It is no new issue now advanced for the first time.

It was raised in the answer to the libel. Fols. 27, 28. It was argued in both courts below.

It has not been of such importance hitherto as it is in the present aspect of the case, because of the fact that the proofs showed, according to the contention of the steamship, that she was initially seaworthy, and because the courts below found that as a fact. *Ante* pp. 9-14.

Now, however, when a satisfactory finding of seaworthiness has been denied to the petitioner in this certificate, the importance of the Harter Act is much emphasized. It was for this reason and to guard against the very conditions now obtaining that when the Court of Appeals asked that a form of certificate be submitted by each party on

the reargument of April 29, fol. 2450, the counsel for the petitioner requested that one of the questions to be certified should be:

"Is the *Folmina* absolved from the damage thus caused to the rice by the provisions of the third section of the Act of Congress approved February 13, 1893, entitled 'An Act relating to the Navigation of vessels, &c.' and commonly known as the Harter Act?"

On the facts proved in the record submitted herewith the use of due diligence within the meaning of the Harter Act is clearly shown. The references to the relevant portions of the evidence are given *in extenso* in connection with the contention that the certificate should have contained a finding of initial seaworthiness. *Ante* pp. 11-14.

The District Court, fols. 2328, 2329, 2332, 2335, 2337, 2338, and the majority of the Circuit Court of Appeals, fol. 2382, must be deemed to have found that due diligence had been used to make the *Folmina* seaworthy. Their finding that the implied warranty of *actual* seaworthiness had been complied with must necessarily be deemed to have included a compliance with the less rigorous statutory requirement. Certainly, the exercise of due diligence can be fairly asserted where, as here, the counsel for the libelants states under oath that the assumed sea water entered "in some way no human being can explain." *Petition for Reargument,* fols. 2441, 2446.

For the reason that the question of the applicability of the Harter Act was not certified, if for no other reason, the present application should be

granted. Otherwise, the petitioner will in effect be denied the statutory exemption given by Congress to ship owners who have exercised due diligence properly to fit and man their vessels.

8. In addition to the two questions of law just discussed there is a serious and closely contested question of fact as to whether the damage complained of was due to sweat or to sea water.

Of this question two of the four judges who have heard this case below may fairly be said to have taken one view, and two the other.

The District Judge did not explicitly find to which cause to attribute the damage; he regarded it as unnecessary to do so in view of his opinion as to the legal effect of the bill of lading exceptions. Fols. 2335, 2336. But his inclination is clearly shown in his opinion, where he says, fol. 2333:

"There may be some mystery about the damages. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as a fact, if the report of the libelants' analysts had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship, strong-

ly aid the evidence that it did not enter. But that is left undecided."

The mineral salt referred to by the District Judge as having been carried by the *Folmina* on a previous voyage was kainit, found principally near Stassfurt, Germany. *Century Dictionary*, Vol. IV, page 326; *Encyclopedia Britannica*, Vol. 21, pp. 228, 229. Kainit is imported to this country for use as a fertilizer, and in its commercial state contains an admixture of from 30% to 45% pure salt or sodium chloride. *Thorpe's Dictionary of Applied Chemistry*, Vol. III, 2nd Ed., p. 269; *Pamphlet of German Kali Works*, (Owner of Stassfurt Mines), 1893, p. 14. According to Thorpe sea water contains all the elements found in the Stassfurt deposits. Thorpe, *Dictionary of Applied Chemistry*, 2nd Ed., Vol. III, pp. 266, 267. He shows by his figures that the average sea water contains about 2.7% of sodium chloride or common salt. This is less than one-tenth of the percentage of common salt found in kainit.

The petitioner's theory is that the damage was due to sweat and that the salt claimed to have been found in the tests was due to the fact that minute particles of kainit which had been carried *in bulk* in No. 3 hold from Hamburg to Charleston, just prior to the *Folmina's* voyage to the East, fol. 1589, had clung to the beams and plating of the vessel and were absorbed therefrom into the rice with the sweat. The probability of this is clearly indicated by the fact that the kainit had worked in behind the cargo battens of the No. 3

hold, and become caked on the plating of the ship. Fols. 1637, 1638. In fact it had to be dug out of the hold with pickaxes. Fols. 1591-1595. The hold had, of course, been cleaned on the voyage from Charleston to New York. But it was obviously impossible to remove the kainit entirely from the side-plating, for the plating was at least nine inches outside of the battens which were permanent fixtures fastened horizontally on the ship's frames at intervals of six to ten inches. Fol. 1165.

The libelants' chemist testified that the presence of *salt would not increase the tendency to sweat,* fols. 706, 707, and their principal cargo surveyors conceded that the *damage would be the same whether due to sweat or salty dampness.* Fols. 172, 508. The kainit was an incident of the damage, in no sense a *cause* of, or *addition* to it. The presence of the kainit did not, therefore, render the hold unfit for the rice.

The contention put forward by the petitioner that the salty traces claimed to have been found in the damage must have been due to kainit, does not mean, as the libelant will probably contend, that the No. 3 hold of the *Folmina* was caked and dirty with kainit or in any respect unseaworthy for the carriage of rice. Kainit, as has been seen, contains a proportion of salt, so much greater than sea water, that a few particles of kainit clinging in places to the side or frames of the ship could very well explain the slightly saline quality of the damage.

This view of the case was evidently taken by the District Judge and by the Circuit Judge who voted for affirmance on the ground that the damage was due to sweat. Fol. 2382. No other explanation of the damage or of its saline quality than that it was due to sweat tinctured with the kainit particles, squares with the evidence. For in view of the impossibility of explaining the presence of sea water, the explanation of the presence of salt already within the vessel clears up the mystery of the damage and points unmistakably, it is submitted, to its true cause.

On this question of fact, therefore, in view of the divergence of opinion below, the petitioner desires to be heard by this Court.

9. Since the opinion of the Circuit Court of Appeals was handed down and the questions certified, Judge Townsend has died. It cannot be inferred from the record what views the two surviving judges of the Circuit Court of Appeals who heard this case may have taken on the questions involved in it. It may well be that they took opposite views of the facts, that one of them held the damage to be sweat, and that, in any event, a reargument in the Court of Appeals will be necessary if this Court passes on the certified questions only. It would, therefore, seem desirable that this Court should pass finally on all the questions involved in the cause.

10. The case is one of unusual importance on the question of liability for cargo damage.

The difficulties involved are indicated suffi-

ciently by the opinions below, and by the fact that questions of law have been certified to this Court by the Court of Appeals.

The damages claimed are not inconsiderable, amounting at the present time with interest to about $30,000.

The certificate sent up does not clearly and fully present the issues to this Court as the evidence entitles the petitioner to have them presented.

The petitioner, it is submitted, ought not to be concluded in this Court by the possibly unfavorable inferences drawn from the facts by two only out of the four judges who have heard the case.

In order, therefore, to conserve the rights of the petitioner, the certificate now before the Court, it is submitted, should be supplemented by the full record of the proceedings below, and this Court should decide the whole matter and controversy as if it had been brought here for review by writ of error or appeal.

11. The petitioner presents herewith a certified copy of the transcript of record returned from the District Court for the Eastern District of New York to the Circuit Court of Appeals for the Second Circuit and of the record in the last mentioned Court.

Wherefore the petitioner prays that this Honorable Court will cause the writ of certiorari to be issued pursuant to the power vested in this Court by the Judiciary Act, approved March 3, 1891, requiring said United States Circuit Court of

Appeals for the Second Circuit to certify the whole record and cause to this Court for consideration, and that thereon this Court will decide the matter in controversy between the parties. And your petitioner will ever pray, etc.

WILLIAM VAN EYKEN,
By Convers & Kirlin,
Proctors.

STATE OF NEW YORK,
County of New York. } ss.:

J. PARKER KIRLIN, being duly sworn, says:

I am the surviving member of the firm of Convers & Kirlin, proctors for the petitioner herein, and I have had personal charge of this litigation throughout. I have read the foregoing petition and it is true to the best of my knowledge, information and belief.

The reason why this petition is not verified by the petitioner is that he is not now within this District.

This application is made in good faith and not for the purpose of delay.

J. PARKER KIRLIN.

Sworn to before me this 26
day of February, 1907.

CHAS. R. HICKOX,
[SEAL] Notary Public,
New York County.

I hereby certify that I have examined the foregoing petition, and that in my opinion it is well founded and entitled to the favorable consideration of this Court.

J. PARKER KIRLIN.

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United States District Court,

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN & WILLIAM J. GRIFFITHS, composing the firm of GUSTAVE A. JAHN & COMPANY,
Libellants,

AGAINST

THE DUTCH STEAMER "FOLMINA," her engines, etc., and WILLIAM VAN EYKEN,
Claimant.

STATEMENT.

1901.

July 17. Libel filed. No process issued. No attachment made.

July 29. Claim filed by W. Van Eyken, master, on behalf of Holland Gulf Stoomvaat Maatschappij, owner. Stipulation for value in the sum of $19750.00 filed.

Aug. 15. Answer filed.

1902.

Aug. 15. Cause tried and

1904.

June 13. Cause argued and submitted before Hon. Edward B. Thomas, District Judge.

1905.

Nov. 17. Decision rendered dismissing libel.

Nov. 20. Final decree entered.

1906.

Jan. 12. Notice of appeal filed.

5 To the Honorable EDWARD B. THOMAS, Judge of the District Court of the United States for the Eastern District of New York:

The libel of Gustave A. Jahn and William J. Griffiths, composing the firm of Gustave A. Jahn & Company, against the Dutch steamer *Folmina*, her engines boilers, tackle, apparel and furniture, in a cause of contract civil and maritime, propounds and articulates as follows:

6 FIRST.—At all the times hereinafter mentioned the libelants were and still are copartners, residing and trading in the City of New York as merchants under the firm name and style of Gustave A. Jahn & Company.

SECOND.—At such times the steamship *Folmina* was and is a Dutch vessel, engaged in the transportation of cargoes as a common carrier. Said vessel is now within the port of New York and
7 within the jurisdiction of this Honorable Court.

THIRD.—On or about the 31st day of January, 1901, Messrs. Popp & Company shipped and put on board said steamship *Folmina*, then lying in the port of Kobe, in the Empire of Japan and bound for the port of New York, 11,200 bags of rice in good order and condition, to be carried and transported by said steamship to the port of New York and there delivered in like good order and
8 condition unto the shippers or their assigns, upon being paid freight at the rate of thirty shillings per ton, according to the tenor of a certain bill of lading then and there delivered to said shippers by the agents of said steamship.

FOURTH.—At the time of the arrival of the steamship *Folmina* in the port of New York, as hereinafter mentioned, the libelants were the owners of the shipment of rice aforesaid, and the holders of the bill of lading issued therefor, and

entitled to delivery thereof, in accordance with the terms of said bill of lading.

FIFTH.—The steamship *Folmina* sailed from the port of Kobe, and in due course, to-wit, on or about the 15th day of May, 1901 arrived at the port of New York and made delivery of the shipment of rice aforesaid to the libelants upon being paid freight therefor; but not in like good order and condition as when received, 877 bags of said rice being wet with sea water and 8564 bags thereof being seriously damaged by heating, owing to the proximity of said wet bags or through some other cause to the libelants unknown, at the time of said delivery to the libelants.

SIXTH.—The extent of the damage sustained by said shipment of rice while in the custody of the steamship *Folmina* cannot be accurately ascertained at present, but the same amounts to the sum of $20,000, according to the best estimates now obtainable. Payment of said sum to the libelants has been refused although duly demanded.

SEVENTH.—All and singular the premises of the libel are true, and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, the libelants pray that process in due form of law, according to the practice of this Honorable Court, may issue against said steamship *Folmina*, her engines, boilers, etc., and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree to the libelants the payment of their damages as aforesaid with interest and costs, and that said steamship, her engines, etc., may be condemned and sold to pay the same, and that the libelants may have such other and

13 further relief in the premises as they may be entitled to receive.

WM. J. GRIFFITHS.

Sworn to before me this
17th day of July, 1901.

WILLIAM A. EADIE,
[SEAL.] Notary Public, Richmond County,
Certificate filed in New York County.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
14 Proctors for Libelants.

Please to take notice that a libel of which the foregoing is a copy was this day duly entered and filed in the office of the Clerk of this Court.

Dated New York, July 17, 1901.

Yours, &c.,
BUTLER, NOTMAN, JOLINE & MYNDERSE,
Proctors for Libelant,
office and Post Office address: Number 54 Wall
15 Street. New York City.

To
CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Libel.—Filed July 17, 1901.

16

To the Honorable EDWARD B. THOMAS, United States District Judge, for the Eastern District of New York:

The answer of William Van Eyken, claimant of the Dutch Steamship *Folmina*, her engines, etc., to the libel of Gustave A. Jahn and William J. Griffiths, composing the firm of Gustave A. Jahn & Company, against the said Steamship, her engines, etc., in a cause of contract civil and maritime, alleges as follows upon information and belief:

FIRST.—He has no knowledge or information sufficient to form a belief as to the matters alleged in the first article of the libel.

SECOND.—He admits the matters alleged in the second article of the libel, except that he denies that at the times mentioned in the libel, the said Steamship *Folmina* was engaged in the transportation of cargoes as a common carrier.

THIRD.—He admits that on or about the 31st day of January, 1901, Popp & Company shipped on board the said Steamship *Folmina*, then lying in the port of Kobe, Japan, and bound for the port of New York, 11,200 bags of rice to be carried and transported by the said Steamship to the port of New York and there delivered under the order of the shippers or their assigns upon being paid freight at the rate of 30 shillings per ton, according to the terms and conditions of a bill of lading then and there delivered to the said shippers by the agents of the said Steamship.

He denies that he has any knowledge or information sufficient to form a belief whether or not the said goods were shipped in good order and condition by the said Popp & Company, and he denies that it was agreed that the said goods should be delivered in good order and condition

21 unto the order of the said shippers or their assigns.

FOURTH.—Upon information and belief he admits the matters alleged in the fourth article of the libel.

FIFTH.—He admits that the Steamship *Folmina* sailed from the port of Kobe, and in due course, to-wit, on or about the 15th day of May, 1901, ar-
22 rived at the port of New York and made delivery of the shipment of rice aforesaid to the libelants upon being paid freight therefor, and he admits that some part of the said shipment was in a damaged condition at the time of delivery, and alleges that it had been injured by sweat or heat, or by inherent deterioration due to its condition at the time of shipment. He denies all the other matters alleged in the fifth article of the libel.

23 SIXTH.—He admits that payment of the sum of $20,000. has been demanded and refused. He denies the other matters alleged in the sixth article of the libel.

SEVENTH.—He admits the admiralty and maritime jurisdiction of this Honorable Court, but denies the other matters alleged in the seventh article of the libel.

24 EIGHTH.—For a further defence and answer, he alleges that the said goods were shipped under bills of lading which recited that the weight, measure, quality, contents and value of the goods were unknown, and which provided for their delivery in New York subject to the following exceptions namely, "The Act of God * * * loss or damage from machinery, boilers or steam, or from explosion, heat or fire on board, in hulk or craft or on shore * * * * risk of craft or hulk or trans shipment and all and every the dangers and

accidents of the seas, rivers and canals and of navigation of whatever nature or kind, are excepted. 25

"The ship is not liable for insufficient packing or reasonable wear and tear of packages * * * leakage, breakage * * * sweat, rust, decay, vermin, rain, spray."

He further avers that the condition of the said goods on arrival was the result of sweating, heat or natural decay due to the inherent and natural condition of the goods or to the latent dampness thereof due to wetting in craft in coming to the ship or while in store or on shore, or to defects in the preparing of said goods for shipment, or to perils of the seas, rivers or navigation within the meaning of the foregoing exception, and that the said condition of the said goods and the damage, if any, resulting therefrom, were not consequent upon any neglect or default on the part of the Steamship or those in charge thereof. 26

27

NINTH.—The claimant further avers that the owners of the said vessel used due diligence to make her seaworthy and to have her properly outfitted and equipped for the voyage, and that the condition of the libelants' cargo on delivery at New York was due to the inherent defect, quality or vice of the thing carried and resulted from the acts or omissions of the shippers or owners of the goods, their agents or representatives. He further avers that if the said condition was caused or contributed to by any faults of those in charge of the vessel, such faults were in navigation or in the management of the vessel. Against any damage caused as aforesaid claimant invokes protection and exemptions from liability provided by the third section of the Act of Congress entitled "An Act relating to the navigation of vessels, etc.," approved February 13th, 1893. 28

29 TENTH.—He further avers that he is ignorant of the charges of fault or neglect intended to be proved or urged at the trial by the libelants, and is therefore unable to plead to the said charges more specifically, but upon information and belief, he alleges that the damages to the said goods was within one or more of the above quoted exceptions contained in the said bills of lading, or within other exceptions contained therein to which he will beg leave to refer at the trial, and that the said alleged
30 loss or damage is, under the terms of the contract of carriage, to be borne by the owners and receivers of the cargo and is not to be borne by the Steamship or the claimant.

Wherefore the claimant prays that the libel herein may be dismissed with costs, or that the Court will make such other decree as may be just in the premises, and he further prays that the libelants may be required to answer the annexed interrogatories fully and truly in writing
31 under oath.

CONVERS & KIRLIN,
Proctors for claimant.

STATE AND COUNTY OF NEW YORK } ss.:
Southern District of New York }

J. PARKER KIRLIN, being duly sworn, deposes
32 and says that he is a member of the firm of Convers & Kirlin, Proctors for the claimant herein; that he has read the foregoing answer and knows the same to be true except as to those matters therein stated to be alleged on information and belief, and as to those matters, he believes it to be true. The reason this verification is not made

by the claimant is that said claimant is not within this district nor within one hundred miles thereof. 33

J. PARKER KIRLIN.

Sworn to before me this 14th day of August, 1901.

JAMES T. KILBRETH,
(SEAL) Notary Public,
New York Co.

34

Interrogatory annexed to the answer addressed to Gustave A. Jahn and William J. Griffiths, composing the firm of Gustave A. Jahn & Company, which they are required to answer in writing and under oath.

First Interrogatory:

What fault or neglect on the part of the agents, servants or owners of the vessel do you claim caused the alleged sea-water damage to the cargo? 35

CONVERS & KIRLIN,
Proctors for Claimant.

[Endorsed:]—Answer, filed August 15, 1901.

36

37

UNITED STATES DISTRICT COURT.

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN and another,

vs.

38 THE STEAMSHIP "FOLMINA."

Before Hon. Edward B. Thomas, Judge.

Brooklyn, N. Y., November 28, 1902.

APPEARANCES:

BUTLER, NOTMAN, JOLINE & MYNDERSE, ESQS. (Mr. Brown and Mr. Thacher) for libelants.

CONVERS & KIRLIN, ESQS. (Mr. Kirlin and Mr. Kilbreth) for claimants.

39

MR. BROWN: If your Honor please, the libel in this case states that the *Folmina* arrived here on the 15th of May, 1901, and made the delivery of the rice in bad order. That 877 bags of the rice were damaged and wet with sea-water. That 8564 bags of the rice were damaged by heating owing to the proximity of the sea-water damaged bags.

We ask to amend the libel by stating that the

40 *Folmina* arrived here on the 9th day of May.

That the number of bags damaged by sea-water was 942.

That the number of bags damaged by heating was 8499.

Motion granted.

The claims of the libel and answer are stated.

John V. Davis. 41

JOHN V. DAVIS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Brown:

Q. What is your business? A. Consulting engineer.

Q. How long have you practiced that profession? A. I have been in active practice as consulting engineer for about fourteen years. 42

Q. Do you make a specialty of any branch of the profession? A. Marine work.

Q. Are you familiar with the construction of vessels? A. I am.

Q. Is it part of your business to find what faults there are in vessels when they exist? A. It is.

Q. Have you made any examination of the steamer *Folmina* for the purpose of determining the origin of certain damages to cargo? A. I made two examinations of the *Folmina;* the first, 43 May 25, 1901, the second, June 7, the same year.

Q. By whom were you retained to make this examination? A. By Messrs Chubb & Son.

Q. Tell what you did on the first occasion? A. On the first occasion I proceeded to the vessel, I think she was lying in the Erie Basin at the time, and the captain was not on board but I saw one of the officers and proceeded into the No. 3 hold; the dunnage and matting was still in the vessel, none of it had been apparently removed, 44 it was in place just as it had been left. After the removal of the cargo I examined the matting and dunnage all over, and as well as I was able at that time the structure of the vessel. The dunnage and matting was wet, sopping wet, and mouldy up to the line of the third line of stringers, hold strongers, in the lower hold.

Q. What were those stringers? A. Those stringers are longitudinal girders running along the side of the vessel for reinforcing and support-

ing the frames of the vessel and are run in lines or tiers horizontally or parallel to the water line along the ship between the bulkheads of the holds. These stringers, there were three lines of them between the ceiling and between-decks, all three of these lines of stringers had water standing in them—not only damp but actual water in which I could put my fingers. The matting lying in and——

By the Court:

Q. You say the stringers had water in them? A. The stringers, they are formed of a plate with angle-irons on each side forming a channel, and in that channel formed by the angle-irons and the plate of the stringer itself the water was standing. The dunnage lying in that channel in each case of each of the three strigers, and the dunnage and matting lying over the length of the stringers for protecting the cargo from contact with the metal, were discolored and mouldy. That was in No. 3 hold only on the starboard side. I examined the port side after examining the starboard side and there was no indication whatever of either water, moisture or mould on the port side; the water and the wet was solely on the starboard side.

By Mr. Brown:

Q. Where was that water and wet—the entire length of the three stringers? A. Practically the entire length but principally towards the forward end of the stringer angle as the ship lay at the time.

Q. Was there any difference as between the three stringers, was there more on the first, second or third? A. I can't say that, I have no recollection of the quantity in each.

John V. Davis. 49

Q. Were the stringer-plates so constructed they could carry water from end to end? A. They are water tight for the length of the stringers but the bulkheads at each end of the hold would form a water way.

Q. Were the stringer-plates pierced by the vertical frames of the ship? A. Yes, sir.

By the Court: 50

Q. What hatch was this? A. No. 3 hold, No. 3 hatch.

By Mr. Brown:

Q. Would the water flow down around the vertical frames and escape? A. No; it would at each end of the hold, it could at each end of the hold but along the middle the angle-iron would prevent its flowing out, the angle-iron forming the channel of the stringer, the angle-iron with 51 the leg turned upwards on top of the stringer.

Q. Weren't there two such? A. Yes, sir. One was against the frame angles, the other out at the external edge of the stringer itself.

Q. How far apart were the two angles, the vertical angles? A. I didn't measure it, I should think 10 inches probably.

Q. What was the extreme width of the stringer-plate from the skin of the ship?

52

MR. KIRLIN: Perhaps Mr. Davis would agree to Mr. Congdon's diagram which is marked Claimant's Exhibit 1, for Identification, of July 6, 1901.

Q. (Handing witness the diagram.) Is this a correct representation of the stringer-plates? A. That is correct. That shows 14 inches instead of 10.

Q. There was no cargo in the hold at the time

53 you went there? A. No, sir; it had been removed and apparently just removed.

Q. Where was the wet dunnage you have referred to? A. The wet dunnage was lying down the side of the ship over the stringers and between the stringers all the way from the ceiling, the bottom of the hold up to the third tier of stringers.

Q. Was that all wet? A. Practically all wet;
54 a good deal of it, I don't say all; but all I examined of it was, on the starboard side.

Q. How about the port side? A. The port side was dry.

Q. What was the condition of the interior of the hold, the under side of the deck? A. On my first examination all I could find, could see of the iron work by pulling some of the matting off and what showed through, the angles and stringers were wet. I examined the vessel again after the
55 dunnage had been removed on June 7 and a good deal of the moisture had then dried out and it was not in as wet condition as it was at the first examination.

Q. On the occasion of your first examination May 25th were you alone? A. I was alone on that day.

Q. The second time was the 7th of June? A. The 7th of June.

Q. Were you alone then? A. I was accom-
56 panied by Capt. Salter then. At that time we called on the captain of the vessel, to whom I was introduced as the captain, and he proceeded with us to the hold. I examined then the skin of the ship right fore-and-aft on the starboard side of No. 3 hold and all the angles and frames and stringers in the lower hold. We then requested the captain to have men remove the housing, the wooden housing around the scupper-pipe passing down through those angles from between-decks

to the bilges, the between-decks scupper-pipe itself.

Q. Locate the position of that scupper-pipe? A. That I am not sure whether it was the forward or after end of the hold, but it was in the extreme corner of the hold on the starboard side close to the bulkhead.

By the Court:

Q. What did you remove to see that? A. The wooden housing which is built around the scupper-pipe.

By Mr. Brown:

Q.That pipe was a lead pipe? A. It was a lead pipe I believe.

Q. Which led from the between decks to the bilges? A. Which led from the between-decks to the bilges of the lower hold.

Q. It led away from the contents of the scupper of the between-decks to the bilges? A. Yes, sir.

Q. Where was the housing, did it completely engulf the pipe through Hold No. 3? A. Yes, sir.

Q. Was it a square box? A. A square box of wood.

Q. What size? A. About 9 or 10 inches square outside.

Q. Was the position of the box between the frames of the ship or inside of the battens that were against the ship? A. It was in between the frames but it lay outside, partly outside of the battens I think, according to my recollection.

Q. You have stated you requested to have that housing removed; tell what was done? A. The carpenter and another man came down and took out every board of the wooden housing removed it from the line of the ceiling up to the first stringer and above that to the upper portion practically exposing the entire pipe to view

61 John V. Davis.

Q. About what sized pipe was it? A. I should think 3 inches.

Q. What did you find the condition of the interior of the casing? A. It was a good deal of it filled up with old mouldy grain choked full, between the pipe and the wooden housing itself.

Q. What was the condition of the mass of grain and old stuff? A. It was black and pretty well
62 rotten, mouldy.

Q. Dry or moist? A. Oh, wet sopping wet.

Q. Did you test it as to the amount of moisture it had? A. No, we didn't test as to quantity. We took it in our hands, it was perfectly wet.

Q. Would moisture run out of it when you raised it? A. By squeezing it yes, sir.

Q. Did you squeeze it? A. I don't know that I did.

63 By The Court:

Q. That was in the housing. It was inside of the wooden housing and outside of the lead pipe.

Q. The housing that covered the pipe? A. The housing that covered the pipe and protected the pipe. The housing would be 9 inches square, the pipe only 3 inches in diameter; the space between the pipe and the wooden housing was the portion choked with the black grain.

64 By Mr. Brown:

Q. Do you remember whether there was a device to keep that pipe in the center of the casing? A. I don't remember such. It sometimes has a wooden filler to keep it central but that is not always necessary nor always used.

Q. You dont remember whether you noticed that on this occasion? A. No, sir, I do not.

Q. In what manner was this casing made—simply nailed or screwed together or how? A. I am not sure whether nailed or screwed. My rec-

ollection is it was screwed together with wood screws. It is intended to be removable and was probably made so.

Q. Is it water tight? A. No, no attempt to make it water tight; it is for protection to the cargo principally.

Q. If there was a mass of water in that casing what would become of it? A. It would find an outlet into the hold.

Q. Where would it come out? A. Probably onto the stringer angles.

Q. Why do you think it would come out there? A. Because the scupper-pipe passes through the stringers at each tier, a hole through the stringers, and the boxing is made up around it.

Q. Where was the lower end of the casing? A. Right down in the limbers of the ship. Oh, the lower end of the casing? Where the floors and ceilings met it came up to it.

Q. You said you think the water would come out on the stringer-plates; why wouldn't it go all the way down to the bottom of the casing? A. In this case the grain choked the boxing practically completely.

Q. If water should run through the seams or cracks of the casing and come out on the stringer plate, as you have said, what would become of it? A. It would ultimately find its way to the bilges at the extreme end of the stringer I suppose by flowing down the corners into the hold and thence into the bilges.

Q. Might it flow over the angles of the stringer-plates and to the cargo? A. No; it would probably find its way when there was sufficient in the stringer channel to either one or the other end of the hold and down where the bulkhead joined it, and at that point are openings left.

Q. Did you say you found dunnage in the stringer-plate? A. Yes, sir, that is laid there usually.

69 John V. Davis.

Q. Would that tend to prevent the flow of water between the end of the stringer-plate? A. It would check any rapid flow. Where the stringer passes through the bulkhead and where the stringer is made up water tight to the bulkheads are corners left open to allow any possible moisture or water passing down and relieving the channel of the stringer from carrying it.

70

By the Court:

Q. That is where the stringer passes the bulkhead do you mean? A. Yes, sir, at that point.

Q. Where was it intended to let the water be carried from there? A. It would then find its way down on the floor of the ship. It is only a provision to allow any possible water finding a way down there; there is no outlet for it except by dropping down the skin of the ship to the top of

71 the ceiling.

By Mr. Brown:

Q. What would become of the water in the groove of the stringer-plate if the vessel were in a seaway and got that pretty well choked up with dunnage? A. The dunnage does not fit the stringer-plate, it would only back the water up and maintain it in little pools, in fact the quantity would not be great.

72 Q. How high is the angle? A. The angle is three or three and a half inches high, the water could never get that high.

By the Court:

Q. How would it finally get to the cargo? A. If there was water there it would siphon over through the cargo to the matting. On those stringers is laid usually in dunnaging a plank to which to attach matting and other dunnage; they lay a plank on the bottom of the stringer angle, on the

stringer itself, down in the channel of it, just laid in there loose. 73

Q. You have for these stringers a longitudinal beam of iron. Is that it? A. That is so.

Q. And with angle-irons that make flanges? A. Yes, sir.

Q. So you have a concave floor or bottom of this beam and the water could run from this scupper-pipe casing in to that channel? A. Yes, sir. If I can show you on the diagram; The scupper-pipe runs down in *that* position, around that is formed the boxing coming down onto that stringer and from *that* to *there,* the pipe itself passing down through those stringers; coming down to this space *here,* the open end of the pipe being in this limber space, any water which find an outlet through the cracks into the casing would come into this channel *there* or into *this;* in that case, that being set up in that way, it would naturally find its way along the groove, it cannot flow on this way on account of that angle, until it came up to the height of the top but before it came to there it would find an outlet one side or the other to where the stringer passed through the bulkhead. 74 75

Q. Do I understand that this pipe you speak of runs longitudinally on the ship? A. No, sir, it runs vertically from this deck. That is a vertical section, amidship section, this being the line of the between-decks; the deck itself, any water on that deck finds an outlet through this scupper-pipe vertically down into the limber of the ship. 76

Q. And does the casing run down the whole length of the pipe? A. It runs down the whole length of the pipe to protect the pipe from any contact with the cargo or any injury that might offer to the pipe.

Q. If the water runs out of the pipe then it can get into this channel? A. Yes, sir, that is, the channel formed by the two angles and the plate.

77 John V. Davis.

Q. What would allow the water to get in there, what would have to be the condition to allow water to get in between the angle-irons? A. I said if the water were in there, which would be the condition —if the water got into that channel then the conditions on which I have been asked exist.

Q. How could the water get from the scupper-pipe? The water has got to come out of the scup-
78 per-pipe first somewhere? A. Yes, sir.

Q. It has got to get out of it or fail to go into it. Now take up the theory that it fails to go into it. Where would it go if it didn't go into the scupper-pipe? A. Between-decks water, if it couldn't get into that scupper-pipe or get around it would lodge on that between-decks through inability to get away. If it did go into the scupper-pipe and the pipe was clear it would go into the limbers, if it went either around the scupper-pipe or, by defec-
79 tive scupper-pipe condition, through defective scupper-pipe, it would pass between the scupper-pipe and the housing, then if it were in the space between the scupper-pipe and the housing it might perfectly readily find an outlet on the stringers.

Q. Supposing it got on the stringers then where could it go? A. It would go naturally to the end where it would overflow or find an outlet to the end of the bulkheads and then run down along the frame angles and the skin of the ship down on to
80 the ceilings, and ultimately through the cracks of the ceiling would find its way into the bilges.

Q. How could it get at the cargo? A. Because the cargo is on the ceiling. In this case this condition existed: There was dunnage plank laid loose on that channel, dunnage wood laid up there and covering the angle in that way with the planks, and matting all over that; now the condition that existed was all this matting *here* was wet, sopping wet, and there was a pool of water in *here*, that condition actually existed; that water that lay in

the stringer had unquestionably siphoned over the matting and wet this portion that was hanging down here.

Q. In other words, given a condition of the water getting into the channel formed by the angle-irons it would siphon through the matting? A. Through the matting to the cargo. 81

Q. So the next consideration is how it would get into the channel formed by the angle-irons. 82

By Mr. Brown:

Q. What was the construction of the scupper-pipe at the top where it led out from the between-decks? A. It was jointed at the between-decks with brass flanges or brass screw connection at the line of the between-decks, and the top of the scupper-pipe was flush with the between-decks, the deck itself.

Q. Was the connection visible A. Yes, sir. 83

Q. Was it covered with cement A. My recollection is it was, the top of the scupper-pipe, the pipe itself.

Q. The screw connection itself you couldn't see? A. It was covered with cement, the actual construction of it.

Q. Was there anything wrong with that cement so far as you saw—or connection? A. No, sir.

Q. In case there were defect in the connection there would be a defect in the cement and the 84 screw connection you have mentioned permit the water to flow down outside of the scupper-pipe and inside of the casing referred to? A. Yes, if there was a defective joint at that deck it would certainly.

By the Court:

Q. Was there? A. Not to my knowledge, I saw none.

85 John V. Davis.

By Mr. Brown:

Q. If such defect had existed how could it be repaired? A. By re-cementing.

Q. Would the re-cementing show it was recently repaired? A. Not necessarily; excepting it had just been done and the cement hadn't sufficient time to harden properly.

Q. How soon after re-cementing would it be
86 impossible to tell whether there had been any repair there or not? A. One day.

By the Court:

Q. Did you find anything out of order except the fact you found water in this channel and the dunnage and matting wet? A. No, sir.

Q. You saw results rather than defective conditions? A. Yes, sir, that is correct.

87 By Mr. Brown:

Q. Suppose there were a defective rivet in the side plating of the ship is that something that would be easily discovered or not? A. Not a single rivet; if there were a group of rivets it would be probably.

Q. I believe you and Capt. Salter and Mr. Congdon attempted to find any defect of that kind and all failed. Do you think that failure would show there was no defective rivet? A.
88 The chances are that it would, but it wouldn't be conclusive, for with the many thousand rivets there would be it would be difficult to find a single one unless you accidentally happened upon it.

Q. Could it be easily overlooked? A. Very readily.

CrossExamined by Counsel for Claimants.

By Mr. Kirlin:

Q. Who asked you to make this examination? A. Messrs. Chubb & Sons.

Q. Were they receivers of the cargo? A. I do not know, sir.

Q. Do you know what their relation to it was? A. No, sir.

Q. What is their business? A. Insurance underwriters.

Q. When did they ask you to go? A. On the 23d of May I was requested to go and I visited the vessel on the 25th.

Q. You were there on the 25th? A. Yes, sir.

Q. What was the nature of your instruction? A. Simply that a certain damage had been occasioned to cargo in the No. 3 hold and to make an examination of the structure of the vessel and the conditions, to trace any possible or probable cause for damage.

Q. You went there to find out what faults had caused the damage if you could? A. If possible, yes.

Q. You have stated all the faults you found, have you? A. I stated I found no fault.

Q. To what extent did you examine the scupper-pipe? A. I examined it by feeling it all the way down after the housing had been removed and after the grain which I mentioned was removed.

Q. I suppose it is manifest no water could get out of that housing into the stringer-plate unless the scupper-pipe was defective in its body or in its connection with the between-decks? A. That is so.

Q. You examined both places? A. Which both places?

Q. The body of the pipe and the joint with the deck? A. Yes, sir.

Q. And you found nothing? A. I found nothing.

Q. Is your memory distinct that the place where the joint was made between the scupper-

pipe and the between-decks was cemented over? A. My recollection is that it was cemented.

Q. The between-decks at that point consists of an ordinary steel plate I suppose? A. Steel plate.

Q. Perhaps half an inch thick? A. About that.

Q. I suppose that would be penetrated by a hole corresponding approximately to the size of
94 the pipe? A. Little larger than the pipe.

Q. The pipe in its original fitting would extend up through the hole into the between-decks and the joint would be made at the top? A. That is so.

Q. And it was made with a brass fitting and secured onto the deck? A. That is my recollection.

Q. Isn't it unusual to cement over a joint of that kind? A. It is not in old ships, no, sir.

Q. But in new ships? A. In new ships they
95 are usually made with a joint secured on to the plate itself.

Q. And left open so it can be examined? A. Yes, sir.

Q. Do you know whether this was an old or new ship? A. No, sir.

Q. We may take it you don't swear positively about the cementing over of that joint? A. Yes, sir, I am not; I won't swear to the exact manner in which that joint on the scupper-pipe was made.

96 By the Court:

Q. Have you a distinct recollection that the cement was there? A. My recollection only is that it was cemented on the top, my memory is it was, but as to the exact method of construction of the joint I do not remember.

By Mr. Kirlin:

Q. Do you mean to swear positively it was cemented over? A. No, I won't swear positively it was.

Q. Did you make any notes of your examination at this time? A. Yes, sir.

Q. Have you got those with you? A. No, sir, not of the June 7th examination.

Q. Have you any notes of the 25th of May examination? A. Yes, sir.

Q. Suppose you tell us what you put on your notes? A. I stated that the dunnage and matting was not removed and all I could find then was 98 the condition that existed of water in the stringers.

Q. It was the second examination when you examined the pipe and its connection with the deck? A. Yes, sir.

Q. That you have no notes of? A. No, sir, not with me.

Q. Do you state positively this scupper-pipe was adjacent to the bulkhead at one end of the hold or the other? A. It was adjacent, it was 99 within a couple frames of the bulkhead, it was not at the bulkhead tight.

Q. It was not right in the corner? A. No, sir, not absolutely in the corner.

Q. Is it not a fact that the scupper-pipe and the entire covering that was around it was behind the cargo-batten? A. I don't think it was entirely behind the cargo battens, if it were we couldn't have got the front board out as we did, we would have to remove all the battening to get it out and there 100 was no such difficulty down there. My recollection is pretty clear it stood out in front of the line of the cargo-battens.

Q. The front part of it? A. The front part of it did, the housing around the scupper.

Q. The housing couldn't go right straight through the stringers, could it? A. No, sir. I stated the housing was made up to the stringers on each tier, I say the housing is in sections.

Q. You didn't take the front board off in one

section? A. I didn't take the front board off in three sections.

Q. And those sections you think were exterior to the cargo-battens, the front part of them? A. Yes, sir.

Q. Your theory is that if there was a defect in
102 the joint of the pipe at the between-decks, and if there as water in the between-decks to flow down it might have flowed down outside of the pipe instead of through the pipe and in that manner have been stopped by what you found in the housing of the pipe and flowed through the crevices of this casing onto the stringer-plate? A. Yes, sir.

Q. You don't recall at which end of the hold this pipe was situated? A. No, sir, I do not. My recollection is it was the forward end but I am not
103 clear on that.

Q. The engine-room was at the forward end of that hold, was it not? A. Yes, sir.

Q. At which end of the hold was it you found the pool of water to which you referred? A. The water lay all along the stringer end, in the middle part as well as at the ends.

Q. To what extent? How much water was there there? A. There was probably on the two lower stringers, it was about even with the flange of the
104 angle-iron, that would be about half an inch of water.

Q. This angle-iron is not level, is it? A. No, sir.

Q. There is a sheer to it? A. There is a sheer to it.

Q. So the water must have been limited to the comparatively short space I suppose in the stringer? A. Comparatively, but it was wet all along.

Q. How long was the pool—let us get at that? A. I should think probably 15 feet, I should think so.

By The Court:

Q. Which stringer are you speaking of now? A. The two lower ones in particular.

By Mr. Kirlin:

Q. Isn't there more than half an inch sheer in the length of 15 feet of those stringer-plates? A. Possibly there was, but there was dunnage board laid all along in that space which would hold water along there.

Q. They were full of dunnage—the stringers—up to the top if the angle-iron, weren't they? A. Pretty nearly, more or less.

By The Court:

Q. How deep are the angle-irons? A. The angle itself is three or three and a half deep in the leg, the thickness of the flange would be about half an inch.

Mr. Kirlin: Mr. Congdon's diagram shows, which your Honor has before you.

Mr. Davis: Six inches by four the diagram shows.

Q. What would that make the depth of it? A. Four inches less the thickness of the angle itself, about half an inch, that would be about three and a half inches; that is a four-inch angle-iron and you take out the thickness of the bottom flange.

By Mr. Kirlin:

Q. The bottom flange does not extend all the way across it, does it? A. No, sir.

Q. It would be four inches deep in the center? A. Yes.

By The Court:

Q. Did they lay boards right through that channel? A. They laid boards in that channel.

Q. How thick board? A. Three quarters of an inch, then on top of that is laid boards vertically and another board on top of that so as to cover all space and protects it from any cargo getting into that space.

Q. Fills it all up? A. Yes, sir.

By Mr. Kirlin:

Q. Then the siphon process to which you have referred couldn't take place unless the trough of the stringer-plate was substantially full of water? A. If there was any water in it would be siphoned probably.

Q. The mats were on top of the dunnage? A. The dunnage would siphon, water would siphon on boards as well as on matting.

Q. Do you think it would run in sufficient quantity to do damage? A. If there was any quantity of water it wouldn't go through the boards.

Q. It would require a pretty large quantity for that, wouldn't it? A. Yes, it would require a fair quantity.

Q. And if the ship was by the stern appreciably the water would tend to drain right back to the end of of the stringer-plate and find its way down along the bulkhead to the bilge, would it not? A. Yes, sir.

By the Court:

Q. Look at this diagram, please. Where does this pipe run from? A. That is the between decks.

Q. Where does the pipe start in the between-decks? A. Right in *there* flush with the top of that deck.

Q. And running down. Where did it go in this case? A. I think it went down in *there*.

Q. The scupper-pipe goes through the stringer, the longitudinal stringer, by means of holes, through holes? A. Through holes bored in the stringer.

Q. When the casing comes to the stringer how do they manage that? A. That is disconnected; it is made up in lengths, from *this* point to *this*.

Q. In other words, your statement is that the casing of the pipe is built in sections between the stringers and fitted at the end closely to the stringers. Is that right? A. Yes, sir.

By Mr. Kirlin:

Q. The angle-irons on the stringer-plates form a continuous line from one bulkhead to the other, do they not? A. Yes, sir.

Q. And the holes through which the scupper-pipe passes are between the canal formed by these angle-irons on the stringer-plate and the side of the ship, are they not? A. My recollection in this case is they were outside, for we made particular observation that if the water came down in that way it would find its way into that channel, and that it would be necessary that it should pass down between the channels, between the angles rather than inside.

Q. Do you mean that the hole through which the scupper-pipe passed was outside of the cargo-battens? A. I dont recollect the position of the cargo-battens at all.

Q. You know how cargo-battens are usually fitted? A. Fastened to the reverse frames.

Q. Weren't these fitted so? A. I dont recollect; it is probable they were so fitted.

Q. There is not any other way to fit them, is there? A. Not that I know of.

Q. Then this pipe must have been on the outside of those or inside of them, the pipe itself; which was it? A. I dont recollect.

Q. In which section of the three sections of the housing of the pipe was it you found this old grain? A. Down in the lower section.

117 John V. Davis.

Q. Do you mean between the lower two stringers, or the bottom stringer and the bottom of the ship? A. Between the bottom stringer and the ceiling.

Q. Between the bottom stringer and the bottom of the ship? A. Yes, sir.

Q. You have spoken about the dunnage you saw on the side of the ship which was in the same
118 position you judged as when the cargo was discharged. What kind of dunnage was that? A. Matting and wooden boards.

Q. Boards standing up? A. Standing all sorts of ways; some up, some horizontal.

Q. Was the matting all in place against the side of the ship? A. Most of it was.

Q. What held it there? A. It was placed under the boards and the weight of the board held it.

Q. There was an opening, was there not in the
119 stringer-plate at each reverse frame? A. Yes, in the stringer-plate, yes.

Q. What would be the size of that opening? A. Just sufficient for the frame to pass through.

Q. How far apart were the reverse frames? A. I didn't measure them, I dont remember.

Q. Give us approximately. A. The frames of the vessel were about 2 feet apart.

Q. So that in every two feet in that part of the stringer-plate which lay between the canal and the
120 side of the ship there was an opening every two and a half or three feet? A. Yes, sir.

Q. Isn't it the fact that a leaky rivet if it lets in water to any appreciable extent leaves a streak which is readily detected by an expert? A. Very usually.

Q. You saw nothing of that kind on this ship? A. No, sir.

121

RE-DIRECT by Counsel for Libelants:

By Mr. Brown:

Q. You have referred to finding a wet mass of grain in the lowest section, did you find it in any other scetion of the casing? A. I dont recollect how far the mass of grain extended up.

Q. All you found was wet? A. All I found was wet.

122

Q. Suppose water ran down inside of the casing and by reason of the mass of grain and material was forced out through the crevices or cracks a distance of a foot or so above the stringer plate might that not flow down on top of the dunnage above the angle-iron and on to the cargo? A. A portion of that might I should think.

Q. Suppose the channel formed by this stringer-plate had considerable water in it what would be the effect of the rolling of the ship from side to side? A. To assist any siphoning there might be.

123

Q. Might the water surge up over the angle-iron? A. I don't think there would be any such quantity as to make that possible.

Q. Do you remember having conversations with the captain on the second visit? A. Our conversations with the captain were not extensive.

Q. Do you remember whether the captain gave any explanation of the cause of the damage? A. No, sir, he did not.

Q. Do you remember whether he said he could or could not account for it? A. No, I don't recolect that.

124

Q. Do you remember anything he said as to the character of the weather on the voyage? A. No, sir.

By the Court:

Q. Assuming there is no defect in the ship how can this water get into this channel? A. I can't account for it.

125 Q. Assuming the ship was in the condition you saw her how could the water get into the channel? A. I dont know anyway in which it could get in the condition I saw her.

Q. What condition of this pipe would have allowed the water to get in there? A. A burst pipe or defective pipe.

Q. Say a burst pipe, that is one way. Defective
126 at what point? A. Either at the joint with the between-decks or in the seams of the pipe itself.

Q. That would be a crack? A. That would be a crack.

Q. I mean where the defective connection would have to be, where it connected with it? A. Yes, in that case there would have to be water on the between-decks to make it possible.

Re-Cross by Counsel for Claimants:

127 By Mr. Kirlin:

Q. Suppose water got into that box in the manner suggested to you, why should it run out the front part of the box into the canal instead of running out the back part on that part of the stringer-plate in which you say there is an opening every two feet? A. My recollection is the boxing was made down onto the stringers so any water on the inside of the boxing would find its outlet onto the stringers and within the space
128 of the channel-way.

Q. That wouldn't be so unless the entire boxing ended in the channel-way? A. Not necessarily, a portion might go that way.

Q. A portion might go one way and a portion the other way? A. Yes, sir.

John V. Davis.

129

Mr. Brown: I offer in evidence the depositions of the following witnesses all of which were taken in England:

William Ryder.
Benjamin Edward Reinanewlands.
Nicholas George Molineux.
John Keefe.
Thomas James Alger.
Walter Cormack.
John Reginald Wright.
John Nevil.

130

Also the depositions of the following lighterman taken in New York.

John Soerensen.
Helmer Johnson.
Thomas Scogland.
Peter Larsen.

131

Also by consent a letter addressed to G. A. Jahn & Co., by H. E. Ritchie, assistant secretary of the New York Dock Company under date June 10, 1902, with like force as if the writer of the letter had been called as a witness and testified to the facts therein contain.

On the fifth line of the letter by a clerical error the steamer is mentioned as *Taomina*, that should read *Folmina*. The correction is made by consent.

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The letter is marked Libelants' Exhibit 1, November 28, 1902.

Mr. Brown: We also offer a stipulation entered into by proctors for the respective parties, under date November 21, 1901.

It is marked Libelants' Exhibit 2, November 28, 1902.

133 Kingman N. Putnam.

MR. BROWN: It is arranged that a stipulation shall be entered in the record that such samples as were returned to this country on the *Etruria* from England were not damaged or affected en transit.

We offer in evidence a letter addressed to G. A. Jahn & Co., under date June 19, to have the same effect in evidence as the
134 letter previously offered.

It is marked Libelants' Exhibit 3, Novemer 28, 1902.

MR. BROWN: We offer in evidence the bills of lading.

LIBELANTS REST.

135

KINGMAN N. PUTNAM, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Brown:

Q. What it your business? A. Surveyer and Appraiser.

Q. How long an experience in that business have you had? A. Twenty-six years.

Q. What is your firm? A. Putnam, Kissam & Koehler.

136 Q. What are the duties you are called upon to perform in that line of work? A. We act principally for marine insurance companies. When they have notice of damages from some of their assured they send us that notice, we examine the damaged merchandise, ascertain how the damage was caused, appraise the loss and make up a statement of loss which they pay to their assured.

Q. Is it a specialty of your firm to ascertain the cause of cargo damage? A. It is.

Q. How long has it been a specialty with you? A. Always.

Q. During the 26 years? What different kinds of damage to cargo by moisture do you know about? A. Damage by actual contact with sea-water and condensed sweat and steam of hold—that is the way I express it.

Q. What is generally called sweat? A. By sweat I mean the actual moisture condensed, not 138
sweat from the merchandise itself.

Q. Is there any third kind of damage you know of from moisture? A. There is heat damage.

Q. What is that? A. Merchandise like rice can be heated by absorption of moisture, the bags not being stained by moisture at all but simply by absorption of moisture. That would only affect articles like rice or corn or wheat or some vegetables, or hay or something of that kind; not general merchandise, only articles perishable in 139
their nature.

Q. When you speak of absorption of moisture do you mean absorption of vapor in the air? A. Exactly—humidity, vapor in the air.

By the Court:

Q. Would that affect the bags themselves? A. It would not stain the bags to any extent and with ordinary merchandise it wouldn't affect the contents of the packages. 140

By Mr. Brown:

Q. What is the process of heating you refer to? A. Do you speak especially of rice?

Q. I am more interested in rice of course just now. A. In this case this rice in the bags which showed very little indication of outside stain—they were practically sound—was off color when milled, it didn't come out perfectly white; when the rice was milled, when the husk was taken off

it was not absolutely white, it was dead and off color.

Q. Is there any connection between heating and fermentation? A. They are about the same thing, heat leads to fermentation.

Q. Those expressions are comparatively synonymous? A. Yes.

Q. In case of a collection of moisture from the
142 inherent component of water in merchandise in the center of a hold, for instance, do you call that sweat? A. I can't quite understand your question.

Q. Supposing you deal with a commodity that contains considerable water in itself as an inherent part, is the wet appearance of the interior of that cargo properly called sweat? Is that what you mean by sweat? A. I don't call that sweat in the hold, no, that is a different thing en-
143 tirely. What I mean by sweat and steam of hold is condensation of the vapor or moisture in the hold of a vessel condensed on deck-plains or beams and dropping back as water.

Q. What causes it to condense? A. Haven't you seen a silver ice pitcher in a hot room on a summer day? The drops of water on the outside of it are simply moisture condensing. And so with a vessel coming from a hot climate to a cold one—iron vessels especially iron being a better
144 conductor of heat, the moisture all condenses and drops back in the form of water.

Q. Due to the fact that the outside of the ship is colder than the inside? A. Exactly.

Q. Where does damage from sweat show itself in the hold of a ship? A. Naturally on the bags or packages of merchandise resting immediately under the deck, and occasionally in the wings, alongside where it is exposed near the iron plates, on the outer tiers and in the between-decks.

Q. Is there more sweat usually in case of a ves-

sel having between-decks, on the upper tier of the between-decks or on the upper tier of the main hold? A. On the upper tier of the between-decks. 145

Q. How does the amount of condensation on the upper tier compare with the amount of condensation at the sides you refer to? A. I have very rarely seen much condensation at the sides, there may be some there but merchandise at the sides is always very well dunnaged and any moisture condensing there runs down between the beams of the vessel without touching the merchandise at all. That doesn't happen when the moisture condenses on the under side of the deck, there it drops right on the cargo. On the side of the vessel it will run down to the bilges without touching the merchandise at all; it is only when the merchandise is stowed up against the iron plates on the side. 146

Q. Where it is so stowed does damage from sweat extend further than to bags at the side? A. I have never seen it only on the outside bags. 147

Q. How much experience have you had with sweat damage? A. Any quantity; for instance, there is hardly a week that we dont see some merchandise damaged by condensed sweat and steam; it is principally on cargoes like rice and cargoes of coffee.

Q. How many years has that been the case? A. Ever since I have been in business. And I have had a great deal from matting coming in ships and coming out badly stained by sweat; and firecrackers that were stowed in the upper part of the between decks, but rarely any condensation of sweat and steam in the hold below the between-decks, I dont think I ever saw it under the between-decks beams. 148

149 By the Court:

Q. That you ever saw what? A. A condensation of moisture under the between-decks.

Q. Why should you not get it on the beams of the between-decks? A Because the temperature there is about the same all through. It is simply where it comes in contact with a cold substance; there is always more sweat in iron or steel vessels
150 than wood because iron is a better conductor of heat and cold.

Q. That same explanation wouldn't hold as to the sides of the vessel. Why wouldn't you get sweat on the sides? A. I think there is always more or less condensation of moisture on the plates at the side but I don't see much merchandise damaged in that way because the water can't get to the merchandise.

Q. But you might get sweat there? A. Natur-
151 ally you might get sweat there.

By Mr. Brown:

Q. Where is the damage to cargo by heating most prevalent? A. In the lower hold naturally.

Q. Is that found chiefly in the sides or wings or where and in the upper or lower tiers? A. I have only seen that in my experience with hide cargoes, there it is principally in the lower hold. I have never seen it with cargoes of rice before. It is very rarely you find it in a cargo of general
152 merchandise on a steamer.

Q. Do you say that in your experience you never saw damage by heating in a cargo of rice? A. No, I don't think I ever had a claim for rice being off color from being heated unless the bags were actually wet or moist from some cause or other; I am sure of it.

By the Court:

Q. If it was from heat it would be a secondary

condition? A. It would be a secondary condition, which might be caused by moisture.

By Mr. Brown:

Q. What are the conditions that conduce to damage by heating? A. Excessive moisture in the hold of a vessel would naturally cause it in an article like rice.

Q. Would the intrusion of water from without 154
tend to promote heat? A. If the rice became wet and commenced to ferment.

Q. Supposing the water admitted passes through the interstices between the parts of the cargo would that have an effect on the heating of the cargo? A. It wouldn't unless the rice commenced to ferment, it would be the decaying rice that would cause it.

Q. Would that condition tend to promote fermentation? A. Sure; that would permeate every- 155
thing in the hold.

By the Court:

Q. Supposing water was let into the hold that did not come in direct contact with the rice but the water evaporated; would that be sufficient to cause heating? A. Not unless the rice became affected so that it commenced to ferment, then it would be the rice that gave off the heat and not the water.

156

By Mr. Brown:

Q. Would that tend to produce fermentation in the rice? A. I think it would.

Q. Have you ever known a case of sweat damage extending in board from the side of the ship to the second or third tiers of cargo? A. Never have, not from the sides of the vessel, never.

Q. Does sweat manifest itself on one side of the ship or on both sides, if at all? A. If it is in the

157 Kingman N. Putnam.

compartment at all it would be on the top and both sides equally.

Q. Have you ever known a case where it has been mostly on one side? A. Never.

Q. From your experience or knowledge of what produces sweat can you account for its appearance chiefly on one side of the ship? A. I cannot.

158 By the Court:

Q. There has been a statement here about the the ship being listed. What do you think about that? A. I didn't hear any corroboration of that.

Q. Whether it was corroborated or not what effect would you say that would have? A. The effect that the heat would all work up the other way, to the port side if she listed to starboard, it would be more sweat damage on the other side.

159 By Mr. Brown:

Q. Are you speaking of heating or sweat damage? A. Sweat damage.

Q. If she listed to starboard you say there would be more sweat damage on the port side? A. I do. It always works upward, never works downward there is always more sweat in the forward part of a vessel than aft.

Q. I am speaking of sweat. I think you answered by speaking of heat? A. Steam and sweat are the same, aren't they? I mean the same thing.

160 Q. You mean heating will cause steam and that condenses in time and would be the cause of sweat, will cause a vapor which may condense on the side and become sweat. A. Exactly.

By the Court:

Q. Suppose this sweating has reached a point where the water is formed on the under side of the between deck beams and the ship were listed to starboard would the water run down hill on the starboard side? A. Sure, on the starboard side.

Q. But your theory is if she were listed over to the starboard—A. There would be more condensation up here than down there. 161

Q. And when you got your condensation—A. Then the water would run down this way.

Q. To the starboard side? A. Yes, sir; but you get the condensation up above first.

Q. It might run down the beams if it didn't fall off before it got there? A. That is true. 162

By Mr. Brown:

Q. If the ship should be sufficiently listed to cause an accumulation of sweat on the under side of the deck to flow towards the starboard side what would become of it, assuming it didn't fall off? A. You would have to have a tremendously heavy list to do it.

Q. You think the roughness of the beams would be such that it wouldn't flow unless there was a tremendous list? A. I have never seen anything of the kind. I think she would have to have a tremendous list. 163

Q. Are the deck-beams fastened to the side? A. I can't say about the *Folmina*, I was never on her.

Q. Is there any place of preference for sweat as between the forward and after hold of the ship? A. We find always more condensation of sweat and steam forward than aft; that is especially so of sailing vessels.

Q. Did your firm have any connection with the *Folmina* case? A. They did. 164

Q. Tell us in what way? A. The notice came to us from Messrs. Chubb & Son, underwriters for Jahn & Co.; my partner, Mr. Koehler, went over and examined the cargo in the vessel; I had practically nothing to do with it except incidentally talking with Mr. Koehler about it, until some time after that. A large number of these bags of rice, they were all in bonded warehouse at Union Stores ..

Q. For what purpose were you retained? A. To protect the interest of the underwriters, to examine the rice and state how it was damaged and agree with the merchants as to the amount of their losses under their marine policy of insurance. A large number of bags were selected as stained and those were subsequently overhauled by Mr. Koehler individually.

166 Q. Did you yourself make any tests of samples of rice, or bagging, from the *Folmina* for the purpose of finding out whether the cause of damage were seawater or sweat? A. I did. I went over there after the selection was made and examined the stained bags.

Q. You went to the storehouse? A. I went to the storehouse, yes, cut samples of the bagging, brought those samples over and tested them personally.

167 Q. What was the result of your test? A. Every sample I tested showed plainly that that sample had been in contact with salt water.

Q. What was the nature of your test? A. Nitrate of Silver.

Q. How many samples did you take? A. Thirty or forty samples I guess. Every one we called sea water damage. There were a lot of bags put out where the rice was damaged where they had not been in contact with sea water. The rice in the stained bags I saw was badly caked and

168 in a very badly damaged condition, caked three or four inches right into the bags. Some of the bags were rotten, stained black.

Q. How many bags were there, said to be from the *Folmina*, that you called sea water damage? A. 942 altogether.

Q. You examined those in Store did you? A. I did.

Q. And also made tests from them? A. I didn't overhaul those bags, those were the bags my partner selected but I saw them.

By the Court:

Q. You took the thirty or forty out of the 942? A. I did.

By Mr. Brown:

Q. Describe their appearance? A. These bags were stained by a dark blue, almost purple, stain on them; some of them were black, some rotten so they had to be sewed up; and the rice was badly caked in those bags.

Q. Was there anything in the appearance to show the cause of the damage? A. In the appearance of the bags? A. I don't quite understand your question.

Q. Did the fact of the rice being caked and the character or kind of color the bags showed give you any information as to whether that damage was sea water, sweat or heat damage? A. Certainly. I said just as soon as I saw the bags that they had been in contact with salt water.

Q. Tell why? A. It is hard to describe why.

Q. Does the caking show anything? A. No, not if the bag is clean. But the bags had sea-water stain, it is different from sweat stain, I could tell from the color it was sea-water.

Q. Would the bags that have sweat damage and those that have heat damage show the caking the same as sea-water damage? A. The sea-water damaged were the only bags that had any caked rice in them at all.

Q. I am speaking in general; do heat damaged bags show caking? A. Fresh water will cake rice just as bad as sea-water if sufficient.

Q. How about heating? A. I should think it would have just the same effect as salt water.

By the Court:

Q. It doesn't cake until it is dry I suppose. These men didn't find it caked and they wouldn't as long as it was wet, would they? A. Not as long

173 as it was wet, no, but when it became dry it would cake.

By Mr. Brown:

Q. I would like you to call my attention to anything by which you could tell to which of the three damages from moisture of which you have spoken this damage belonged? A. I would certify that
174 that damage was from sea-water.

Q. From the test you made? A. First from the appearance of the bags, then from the test by the nitrate of silver.

Q. What is the character of the damage that sweat gives with reference to saltiness? A. If these bags had been damaged by fresh water a piece of that bagging tested by nitrate of silver would not show any white precipitation. That nitrate of silver test simply means, when it is put in
175 the glass where the sample of bagging is soaking and the white precipitate follows, that the nitrate mixes with the chloride of sodium and leaves the salt precipitate; it is a qualitative test; it always shows salt where it has been in contact with salt water.

Q. Is there any difference in effect between damage by fresh water and damage by sweat? A. Do you mean on rice? I dont believe there is.

Q. Sweat damage is essentially fresh water
176 damage, isn't it? A. Yes.

Q. How about heat damage? A. About heat damage?

Q. Are there any evidence of salt in samples damaged by heat? A. No. Large numbers of these bags were off color and those bags were not stained at all but were a little mouldy, you could see green spots on them, that was from moisture.

Q. Was that in the sea-water damaged? A. No, it was in the 7104 bags that were off color without being stained by water. There were 7104 bags of

this rice in which it was off color and a large number of those had mouldy spots on them blue or green, in places one here and one there and that was caused by absorption of moisture striking the bagging and making a small spot.

Q. The 7104 bags were not injured by sea-water? A. They had not been wet by either sea-water or sweat but the rice in these bags was off color and some of the bags showed signs of blue mouldy 178 stain in certain spots.

Q. You said they had been affected by aborption—of what? A. Moisture; but not actually wet, just vapor of water.

Q. Do you say those bags had been damaged by heating or not? A. I say the rice in those bags had been heated to a certain extent to make it off color and dead.

Q. Does the heating produce the color you found in those bags? A. It is the only explanation of it. 179

Q. Did you make tests from the heated and sound samples? A. I did.

Q. What was the result of such tests? A. I found no salt whatever in the samples tested, no trace of salt.

By the Court:

Q. No salt in the 7104 bags? A. That is right.

By Mr. Brown: 180

Q. And no trace of salt in the remainder of the cargo which was called sound? A. No.

By the Court:

Q. How about the 942 bags, does that 942 include all the damaged bags? A. They include all we considered damaged by actual contact with sea-water.

Q. You found no salt in the 7104 bags or in the remainder of the cargo except in the 942 bags.

181 What did you find there? A. We found that every sample of the bagging we tested—and we tested at least 20 samples—showed that bagging had been in contact with salt water—showed this evidence.

Q. You are speaking of the bagging itself? A. Of the bagging, yes, sir.

182 By Mr. Brown:

Q. Did you test the rice also? A. I think we did but I didnt pay much attention to that. It was the stained portion of the bagging I was testing. Mr. Koehler made more of these tests than I did.

Q. Did your firm cause chemical analysis to be made of these samples, or similar samples, by chemists here? A. We did.

Q. Whom did you retain? A. Shierer Brothers?

183 Q. By whom were the samples furnished to them? A. I think Mr. Koehler took them to them himself, or they sent up to our office and got them. I didnt have anything to do with that.

Q. The testimony in this case tends to show that there was a considerable amount of damage on the starboard side of lower hold No. 3, somewhere between a third of the way down and two-thirds of the way down, the damage where it was worst extending to at least three bags from the skin of

184 the ship. Are you able from that statement to form any opinion whether that damage was, or was not, sweat damage? A. I do not believe it was possible for that damage to be caused by condensed sweat or steam in hold in that locality; if so it is the first time I ever saw such a thing in 26 years.

Q. Can you from that statement form any opinion whether that damage was, or was not, heat damage? A. It was not heat damage.. it was salt water damage. I would be the first one to

take the position that that was sweat or heat damage if I could.

MR. KIRLIN: I move to strike out that last sentence of the answer. It is highly speculative at best.

Motion granted.

Q. Was it for the interest of your employers to show that that was sweat damage or not? 186

Objected to. Objection sustained.

(The Witness): My province is simply to report facts.

Q. To come back to your nitrate of silver test: Is there any other explanation of the white precipitate you saw except that of sea-water damage? A. No, there is none.

Q. Have you had occasion to try the test on sound samples of rice at other times? A. I have. 187

Q. Do sound samples of rice show any precipitate? A. They might by analysis but they wouldn't by this test.

Q. I mean in the way you did it? A. No.

Q. They would show none at all? A. I mean there is probable a faint trace of salt in everything that would show by analysis but not by this qualitative test.

Q. In your former tests of sound rice has there ever been any white precipitate? A. No. 188

CROSS-EXAMINED by Counsel for Claimants:

By Mr. Kirlin:

Q. You, I understand,, were not actually on board the *Folmina* at any time? A. I was not.

Q. Was Mr. Koehler? A. Mr. Koehler and Mr. Kissam both were there.

Q. Your definition of sweat you have limited to

condensation against the deck or side of the vessel, havent you? A. Yes, sir.

Q. And yet you concede, as I understand it, that heating of the rice that takes place would start an evaporation of moisture in the hold? A. Do you mean the ordinary heating of rice?

Q. Such as must have occurred in the 7104 bags to make them the color you said they were? A.
190 That would probably be so.

Q. What would you call that moisture? A. I call that sweat too.

Q. What would be sweat if there was enough of it to affect anything? A. Sure.

Q. And that would be in amongst the cargo until it reached a place where it condensed against something cold? A. The heating of the rice would cause the heat and that heat I don't think would condense under the between-decks.

191 Q. You have said it did condense? A. Under the upper deck. I have never seen sweat condense under the between-decks.

Q. You said many of the 7104 bags were mouldy? A. Yes.

Q. And that mould you said came from condensation of the atmosphere? A. No. I said it came from moisture.

Q. Where did the moisture come from? A. From the sea water damaged bags in my opinion.

192 Q. Do you think the condition of damage, which was along the outside of the vessel according to the testimony here would be sufficient to cause damage by moisture in the heart of the cargo? A. I don't say there were many bags in that condition. I say some of them were.

Q. Just answer the question, please. A. I think so. I think there was moisture enough to affect the cargo in that way from the bags that I saw.

Q. There would be enough moisture as you have

heard it described here to-day to affect 7104 bags of rice through and through, would there? A. I do. I am not paying any attention to the testimony I heard here to-day but to what we know in our office.

By The Court:

Q. You say the moisture coming from the condition of the bags that were injured by salt water 194
would be sufficient to produce the defective condition of the 7104 bags? A. I do. I say there was sufficient moisture in the 900 water damaged bags to produce the mouldy condition on the bags I saw mouldy of the 7104.

Q. What effect would that have on the rice? A. I don't think the mouldy condition of the bags had any effect on the rice at all, I think what was

Q. Your idea is that in the 7104 bags the rice itself had nothing to do with the damages coming 195
from salt water, directly or indirectly? A. No, I think you are mistaken there. I think this heat that developed in the 7104 bags was nearly all, if not all, caused by the water damage.

Q. But it was not caused by the discoloration of the bags? A. No; simply that the heat developed in the bags that had been actually wet by sea-water was intense and as the cargo was ventilated —it was very well ventilated—running all through that heat simply permeated all through the bags; 196
the bags were all stowed flat together and the air space ran all through and the heat was carried all through that vessel and that is the reason so many were affected. That is my opinion of it.

By Mr. Kirlin:

Q. Then it comes to this: That the bags you assume were damaged by sea-water heated—A. And caused the damage to the 7104 bags.

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Q. What did the heat produce, what was the first effect of the heat? A. What do you mean?

Q. You said the heat in the bags which you assume were damaged by sea-water must have been intense? A. Yes.

Q. Did that produce any effect? A. Yes; it made the rice in the other bags off color.

Q. What was it made it off color? Trace it
198 from the heat to the damage. A. I say the heat penetrated all through all the bags and affected all the rice in all those bags.

Q. The heat permeated the hold and went through the rice, did it? A. Yes.

Q. And heated the rice? A. Yes, caused the rice to heat. Mind you, it wouldn't take very much heat to cause that rice to ferment.

Q. Supposing that rice heated without any sea-water damage in the hold what effect would it
199 produce on the rice? A. The same effect.

Q. Supposing it heated from its own inherent quality? A. You would have exactly the same effect.

Q So far as the color of the 7104 bags of rice is concerned it is a mere matter of opinion whether it is due to heating of the rice from inherent quality or to heating of the rice from the heating of the bags that you assume were damaged by sea-water? A. I am simply giving my opinion of
200 what caused the damage here to the rice.

Q. It is a matter of opinion? A. It is a matter of opinion.

Q. When there is enough heat in the hold to permeate rice in 7104 out of 11000 bags why wouldn't there be condensation of that around wherever the system of artificial ventilation went as the cold air from above came down? A. The cold air from above didn't get down—how could it?—it didn't come there in this case.

Q. What is that system of ventilation for? A. I don't know. I didn't go on board that vessel. 201

Q. Have you ever been on board a vessel that had rice on? Yes.

Q. Have you examined those systems of ventilation? A. I have.

Q. What are they for? A. To keep the rice from heating.

Q. Isn't it for the purpose of admitting air from above around the rice? A. No, I don't think it is. It is simply to let any air of the hold get out through the ventilator. 202

Q. To let the heat out? A. To let the heat out. I have never seen a cargo of rice come here in this condition before.

Q. How many cargoes of rice have you actually examined? A. I examine all the rice that comes here when it is claimed to be damaged and I never had a claim like this in 26 years. 203

Q. Is there not much rice imported? A. Mr. Jahn has a good deal.

Q. How many have you examined in the last year? A. This is the first one I have had.

Q. How many the year before did you have? A. I doubt if I have had a claim on one for four or five years.

Q. As matter of fact you have not examined very many rice cargoes, have you? A. That is true. 204

Q. Not very many come here and not many have claims on them as far as you know? A. That is very true.

Q. You were employed to look after this matter by Messrs. Chubb & Son? A. My firm was.

Q. One element of your work was to effect an agreement with the assured as to the extent of his damage? A. That was one feature.

Q. Did you do that? A. I don't know whether that has ever been settled.

Q. Did you make the agreement with them? A. Mr. Koehler did. I did not.

Q. You said you had not seen much damage down on the sides of vessels in cargoes you have examined. Have you examined tea cargoes? A. Lots of them.

Q. Have you often found damage by sweat all the way down the sides of cargoes? A. I have
206 seen it on top; very rarely on the side, because packages don't rest against the iron work.

Q. Haven't you seen it where tea was damaged by sweat down on the sides? A. No.

Q. You haven't? A. No.

Q. Did you personally make these tests you have testified to? A. I did.

Q. How many pieces of bagging did you actually test yourself? A. I don't know how many I tested. I think we tested—the office altogether,
207 either I or Mr. Koehler— about thirty samples outside of what he gave to the chemists; I am not quite sure .

Q. Did you test any of these that were spotted with mould that you have spoken of in the lot of 7104 bags? A. We did.

Q. Did you test the mouldy spots? A. We did.

Q. Did you test any of the rice in the *Folmina's* cargo by this nitrate of silver test? A. I am pretty sure we did.

208 Q. Did you personally? A. Yes, I did; I remember it distinctly, right out of those samples I have got there in those bottles.

Q. When did you do that? A. Shortly after I brought those samples over, sometime in July I think it was.

Q. Were these samples you are now testifing about samples that came from aboard? A. That is what remains of the rice now. No, those are samples I took myself.

Q. When you made you examination in July? A. Yes.

Q. Did you test by chemical analysis the rice in any of the 7,104 bags? A. I did not.

Q. I mean did you test it by this nitrate of silver test? A. Oh, I thought you meant samples that were returned from aboard of that lot.

Q. No. A. No.

Q. These 7104 bags that you put in a class by itself, did you test any of the rice in that lot? A. Yes; one of those bottles contains samples of that lot?

Q. Did you test it yourself? A. Yes.

By the Court:

Q. What did that show? A. No salt.

Q. It wouldn't even if you are right? A. No, no. The only bags that showed salt water damage were those bags that were manifestly stained with the black stain.

By Mr. Kirlin:

Q. What is the percentage of salt in common rice? A. I don't know. I am not a chemist.

Q. Who prepares this material that you use for these qualatative tests? Can you purchase it at any druggists? A. Yes—a five per cent. solution of nitrate of silver.

RE-DIRECT by Counsel for Libellant:

By Mr. Brown:

Q. Considering the character of the ventilation of the *Folmina* as you have heard it described here to-day is it possible in your opinion that the cargo might have heated as you saw it heated in the 7,104 bags without the intrusion into that hold of water from without, and from the inherent qualities of the rice alone? A. Basing my

opinion on the description I have heard of the ventilation placed all through this cargo of rice, or shipment of rice, I was led to believe that was about as well ventilated as it could possibly be, that is, if there has not been some tremendous amount of moisture or fermenation in that compartment none of this rice would have been in a heated condition. There must have been some
214 extraneous moisture or fermentation or extra heat to cause it.

Q. Would the leaking of sea water in the hold account for it? A. Leaking of sea water would not account for it unless it came in contact with the rice, as it did in this case, and caused the rice to heat. It was fermentation of the rice in the bags that caused the heat, not heat primarily caused the rice to ferment.

Q. What would be the normal amount of heat
215 damage, if there would be any normal amount, in a cargo of this character ventilated as this was, without intrusion of any sea water from without? A. I can't answer that question.

Q. Do you mean it would be very small? A. I don't know. I can't answer it.

Q. Would 7104 bags damaged be a normal amount to be damaged in such a case as this? A. This is an extraordinary case as I have already said, a very extraordinary case.

216 Q. Does the ventilation of this cargo as it was ventilated have any effect on the probable amount of sweat that would accumulate on the sides of the ship? A. I don't think it would have any effect at all. Most of this rice was in the lower hold of the vessel; any heat developed in that rice in the lower hold would not affect the humidity of the atmosphere in the between-decks. The hatches were on. How could the moisture get in the between-decks? How could the heat get in the between-decks?

Q. The testimony is that the hatch of the between decks was not on? A. A man testified here that it was on.

Q. That is one witness. All the others testify to the contrary? A. I don't know whether it was on or not.

Q. Assuming that that hatch was not on and that, as testified by the ship's officers the spar-deck hatches were off about half the time, what 218
effect would that have on the accumulation of sweat? A. There was no accumulation of sweat in the between-decks of the vessel, the bags there came out sound and so did the other cargo. The water in this cargo, whether it was fresh or salt, was in the lower hold under the between-decks. If the ordinary heat of this rice would cause a condensation of sweat and steam in the hold and that would get into the between-decks the entire property of that between-decks would be dam- 219
aged. As matter of fact there wasn't a single package there damaged. In other words, the only water or other damage of this cargo was in the lower hold.

Q. You give it as your opinion that there could not have been any amount of sweat in the between decks because there was no damage there? A. That is all the conclusion I can draw.

By the Court: 220

Q. Why wouldn't the heating of the 941 bags also affect the bags in the between-decks? A. I think it is rather strong to use the term "heating." The rice wasn't hot. When it was milled it was off color, they call it heated. You couldn't feel any heat in the bags.

Q. Your idea is that salt water came in and affected 941 bags, or some portion thereof, and that that produced a large amount of heat which affected the 7,104 bags in the hold. If the be-

221 tween-decks hatch was off why shouldn't that affect the rice in the between-decks? A. The rice in the between-decks was stowed way aft of that hatch, it didn't come close to that hatch. I don't know whether that was ventilated or not.

Q. Wasn't it stowed in the forward part of the between-decks? A. The after part I think, I think the rice was stowed just forward of No. 4.

222 There was no hole where the heat could come up from the lower hold into the between-decks

Q. They claim the hatch cover was off? A. Even then that hatch was full of rice up to the top and a lot of curios on top of that; it evidently didn't get there.

By Mr. Brown:

Q. The fact is there were a couple thousand bags of sound rice at least, were there not? A.

223 Yes.

Q. How do you account for those not being affected? A. I presume those came out of the between-decks, most of them.

Q. Would bags be differently affected according to whether they were near or remote from the place of sea water damage. A. I presume they would.

Q. Have you ever known a case of seating filling the stringer-plates with water? A. Yes.

224 Q. Is that a frequent occurrence? A. Not frequent, but I have seen it. I have seen three inches in a stringer-plate at one time.

Q. In case a vessel has three sets of stringer-plates would the accumulation be in the upper, middle or lower stringer-plate? A. This one I saw was in the upper one. I think that upper one would fill up first; that this condensed on the under side of the deck and ran right down the beams and the frames of the vessel and accumu-

lated right there. That was on a cargo of sugar coming from the West Indies—or from South America it was, it was not from the West Indies.

Q. What are these three samples I show you, marked *Folmina* No. 1, *Folmina* No. 2, and *Folmina* No.3? A. These are samples of rice I took originally from the store. No. 1 is sound rice. No. 2 is heated rice. No. 3 is sea-water damaged rice. The weevils have considerably injured all 226
three samples especially No. 1, the sound rice.

By Mr. Kirlin:

Q. Is there any sound rice in sample No. 1 at present? A. No.

Q. What is in it? A. Dead weevils.

Q. So we cannot form any judgment from that sample how the rice looked, can we? A. No. you cannot.

Q. Sample No. 2, how does that compare with 227
the way it looked when you took it? A. Good deal worse than when I took it.

Q. And has got weevils in it now, hasn't it. A. Yes.

Q. And about half the sample is consumed by it. A. Yes.

Q. Has discoloration resulted from dead weevils? A. Discoloration of that rice? No. That rice is all the same it was when put in there.

Q. The top part of it seems to be browner than 228
the bottom? A. That is the weevils.

Q. About half or more of sample No. 2 seems to be consumed and a large part of sample No. 3, is that so? A. Not so much of sample No. 3.

Counsel for libelant offers the three samples in evidence.

Objected to on the ground that it does not ap-

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pear that the samples are in the same condition they were when the witness took them.

Adjourned to Saturday December 6, 1092, 10:30 o'clock.

230 Brooklyn, N. Y., December 6, 1902.

Met pursuant to adjournment.

ARTHUR S. GOULD, being duly sworn and examined as a witness for the libelant, testifies:

By Mr. Brown:

Q. What is your business? A. Manager of the Time Charter Department of Barber & Co.

Q. Who were agents of the *Folmina* at this
231 time? A. They were time charterers of the *Folmina* on this occasion.

Q. By whom was the discharge of the vessel performed? A. The Atlantic Stevedoring Company.

Q. Is that the concern having offices together with Barber & Co.? A. Yes, sir.

Q. At the time of the discharge of the *Folmina* were you in the employ of Barber & Co. or of the Atlantic Stevedoring Co. A. Barber & Co.

Q. How long have you been in the employ of
232 Barber & Co.? A. About four years.

Q. Do you habitually visit their vessels? A. Yes, sir.

Q. Are you familiar with the appearance of the cargoes they handle and their out-turn? A. Yes, sir.

Q. Did you visit the *Folmina*? A. I did.

Q. What did you find to be the condition of the cargo upon your first visit? A. In the No. 3 hold or general cargo?

Q. Particularly in No. 3 hold? A. The general condition of the cargo with the exception of No. 3 hold was very good, but there was a damage in No. 3 in the lower hold.

Q. About how much of the cargo had been discharged when you went there? A. My recollection is it was all discharged from the between-decks and about half of the lower No. 3.

Q. Where was the ship berthed when you went 234
there at that time? A. Old Pier 30, East River.

Q. That is on the Manhattan side? A. New York side, yes

Q. Was she bow in or stern in? A. My recollection is she was bow in.

Q. Do you recollect which side of the pier she was on, north or south side? A. South side.

Q. What did the damage to the cargo in No. 3 hold that you saw consist of? A. The principal damage was to rice. In fact that is about the 235
only cargo I think that I took any particular note of being seriously damaged.

Q. What was the character of the damage? A. The bags were wet.

Q. Where was the damaged place, what was the position of the damage? A. It was on the starboard side and about midway I should say, or from the bulkhead extending about midway of that whole hatch.

Q. Do you mean midway from the ceiling to the 236
between-decks beam? A. No, from the bulkhead, from the engine-room bulkhead aft to the center of No. 3 hatch.

Q. How serious damage was it? A. It was rather more so than we generally turn out, just how serious of course I couldn't say.

Q. Were the bags actually wet at the time to the touch? A. Oh, yes, sir; yes, they were.

Q. Did you notice the condition of the dunnage? A. That was wet in the skin of the ship.

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Q. Do you mean the dunnage against the skin of the ship? A. Against the side, yes, against the skin.

Q. Was there any damage on the port side? A. I am not quite sure about that. My recollection is that in one place there was a slight damage but it was very slight, I wouldn't say positively that such was the case.

238 Q. On the starboard side was the damage only in the tier next to the battens or extended further inboard? A. Oh, it extended in. My recollection is it extended in to the second tier.

By the Court:

Q. To and including the second tier? A. Yes, sir, to and including the second tier.

By Mr. Brown:

239 Q. Do you remember whether the bags were stowed with their long dimensions fore-and-aft or athwartships? A. No, I do not recollect that.

Q. Were the bags in good condition as to strength or were they rotted and decayed, weakened? A. Oh, a great many of them were rotten, that is what called my attention to their condition in the first place. When the stevedores were slinging them up you know they would fall to pieces.

240 Q. Was there any odor in the damaged goods? A. Yes, especially those that were very rotten there was an odor.

Q. A strong unpleasant odor? A. Not at all pleasant.

Q. A strong odor, was it? A. Yes, sir, it was a strong odor.

Q. How much experience have you had in examining cargoes of rice from Japan and China? A. Most every steamer that we load in China and Japan has more or less rice and it is my custom

to visit all these steamers while they are discharging, which I have done in the last three years.

Q. Are you familiar with cases of sweat damage? A. I have seen some, yes, sir.

Q. Was the damage in this case similar to cases of sweat damage? A. Well no, not as my experience teaches me.

Q. In what respect was it different from sweat 242
damage? A. Sweat damage I think as a rule the bags are simply discolored and I have never seen them rotted, as these were.

Q. Was there anything in the position of the damaged bags in the *Folmina* case to indicate to you whether it was sweat damage or not? A. No, not in the position; not from the position of the bags, no.

Q. Have you known in other cases of sweat damage that the sweat extended down from the 243
between-decks a considerable distance? A. As a rule only to the first tier, the uppermost tier.

Q. How is it as to the direction fore-and-aft, do you find it only in the center? A. Where it is sweat damage the sweat runs along the fore-and-afters, and it may run across the cross-beams as well, and the bags perhaps the whole length of the hold from sweat damage would be wet.

Q. Have you known any other case of sweat damage in which the damage was localized in the 244
center of the hold with reference to its fore-and-aft dimension? A. No, not extending down below the first tier of bags.

By the Court:

Q. You haven't known of sweat going below the first tier? A. I have not, no sir, never have seen a case.

By Mr. Brown:

Q. What prevents sweat damage from extending below the first tier, the uppermost?

Objected to as to form.

A. I dont know that I can answer that question, what prevents it.

246 Q. Is the cargo generally stowed up snug against the skin of the ship? A. They generally use dunnage, they generally put mats along the skin of the ship.

Q. Generally vessels have cargo-battens inside of the frames, don't they? A. Yes, sir.

Q. Does the fact that you found very serious damage on the starboard side and little or none on the port side indicate in your opinion anything as to whether it was sweat damage or not? A. The morning I was in the hold of that ship I made

247 up my mind what the cause of the damage was.

Q. Can you express any opinion as to the inference to be drawn from the fact there was a great deal of damage on the starboard side and almost none on the port? A. I think there was a leak there, that is the only way I can explain it.

Q. Is that consistent with its being sweat damage, that a great deal was on the starboard side and very little on the port side? A. Not in my opinion, no, sir.

248 Q. Have you ever known a case of sweat where it was as much greater on the starboard side than on the port side? A. Oh yes, sir, I have known cases of that sort.

Q. Have you known cases where the disparity was as great as in this case? A. No, sir.

Cross-Examined by Counsel for Claimants:

By Mr. Kirlin:

Q. Has it been common to discharge as large a

quantity of rice coming in to this port on one vessel as you had on this occasion? A. No, not in my recollection; I think that is one of the largest rice cargoes we have had.

Q. In previous shipments you have had was there any experience of damage resulting from heating of the rice in the hold and decaying bags or rotting the bags themselves? A. Well, I think my recollection is that there was a claim on one 250
steamer, they claimed that was the cause, of overheating, but I dont recollect just exactly what disposition was made of it, I think the thing was dropped.

Q. Did you yourself see the damaged rice in that case? A. No, I did not.

Q. You cant speak then from your own experience as to what the effect would be of heating the grain in the body of the cargo that is below the upper tiers? A. No, I cannot. 251

Q. You have said that you reached the conclusion there was a leak. Did you see anything of any leak? A. I did not, no, sir.

Q. That was merely an inference on your part from the extent of the damage? A. From the extent of the damage and the condition of the bags.

Q. That is from the number that were wet and the extent to which they were wet? A. Yes, sir.

Q. Do you recollect whether the position of that part of the damage that you saw in the lower hold 252
was anywheres near the fore-and-aft stringer-plates? A. No, no, it was not. When we got down to the worst of the damage she was—half of that lower hold was discharged.

Q. She had three stringer-plates, according to the testimony, in the lower hold which in a rough way divided it into three longitudinal planes, can you tell in which plane the damage was that you specially noticed? A. No, I cannot from my recollection.

253 Arthur S. Gould.

Q. You didn't mark the damage with reference to any stringer-plate? A. No, I did not.

By The Court:

Q. How far down in the hold had they got before you noticed the condition? A. About half way.

Q. Do you mean you hadn't visited the hold
254 while they were discharging the upper part of it? A. Not while they were discharging the between-decks I didn't go down in the hold.

Q. Were you in the hold when they began to discharge the hold? A. No, not until we struck the damaged cargo.

Q. So what the condition was up above you you don't know? A. I have no recollection of it except going there every morning while the steamer was discharging. If there had been any damage
255 to the top tier of bags I would naturally have gone down in to examine it.

By Mr. Kirlin:

Q. Was it on the morning you had your attention first drawn to this damage you went below? A. Yes, sir.

Q. You did go below? A. Oh, yes, sir.

Q. That is the first you had heard of any damage? A. Yes.

256 Q. And then, according to your recollection about half the cargo was out of the lower hold? A. About half the cargo was out of the lower hold.

Q. Have you any special recollection about how the interior of the vessel was prepared for cargo as you could see from the condition of the stowage when it was uncovered? A. I think my recollection is she had the usual quantity of dunnage and usual mats around the stanchions and on the skin of the ship.

Q. "On the skin of the ship," by that expres-

sion I suppose you mean up against the cargo-battens? A. I mean up against the cargo-battens, yes.

Q. Do you recollect about what space there was between the cargo-battens and the actual skin of the ship? A. No, I couldn't say.

Q. It would be represented by the depth of beam, would it not? A. Yes, sir.

Q. Do you recollect about what that was? A. 258
No, I do not, I do not.

Q. It wouldn't be less than 9 inches would it? A. No, sir, I would not think so.

Q. What kind of battens were they that were on the beams fore-and-aft? A. Do you recollect what the dimensions were, roughly? A. No, I don't.

Q. Are those battens three-inch planking, or something of that sort, or scantlings, or planks, or what? A. I should call them scantling; about 259
two and a half or three inch scantling, I should say.

Q. How far apart, commonly? A. I don't know how far apart they were. I didn't examine as closely into that as that.

Q. There was nothing about the condition there that attracted your attention as being at all peculiar? A. Not at all, no, sir.

Q. As far as your observation went did it seem to be the ordinary system of battening along the side? A. Exactly so. 260

By Mr. Brown:

Q. When you went there in the morning did you see the cargo coming out? A. Every morning? Yes, sir.

Q. Did you notice the bags coming out? A. Yes, sir.

Q. Did you see any damaged bags up to the time your attention was called and you went down in the lower hold? A. I did not.

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GUSTAVE A. JAHN, being duly sworn and examined as a witness for the libelants, testifies:

By Mr. Brown:

Q. You are one of the libelants in this case? A. I am.

Q. What is your business? A. Importer and miller and distributer of rice, sugar, molasses and

262 so on.

Q. How long have you been engaged in that business? A. About forty-three years, from boyhood up.

Q. Is the milling of rice part of your business? A. Yes, sir.

Q. Do you own a mill? A. I have owned a mill, run a mill at the Atlantic Docks, have been established there since 1888; I am also interested and running rice mills in the South.

263 Q. Are there many other rice mills in this part of the country? A. At the present time I don't know of any this side of Wilmington, North Carolina.

Q. For how long has your mill been the only one this side of Wilmington? A. I think the last three or four years.

Q. What was the quality or character of the rice you imported on the *Folmina?* A. It was the undressed rice, undressed Japan rice.

264 Q. About what proportion of rice of that character that comes into this port is imported by you? A. Rice of this character for milling purposes? What proportion?

Q. Yes. A. I don't think there has been any other outside of mine in the last three or four years.

Q. When did you first see the cargo of the *Folmina?* A. At the warehouse when it was being discharged from the lighters.

Q. Where was the warehouse? A. On the Brooklyn shore.

Q. What was its condition? A. In a very badly damaged condition. 265

Q. What was the size of the shipment? A. I think 1,000 tons, about 10,000 bags.

Q. Out of those 11,000 bags how many were damaged? A. Fully 1,000 bags of it according to my opinion. It was 1,000 tons—I dont know to a bag—1,000 tons would be about 11,200 bags.

Q. Of that quantity how many bags were damaged? A. There were fully 1,000 bags that were utterly destroyed almost. 266

Q. Outside of that 1,000 was there any damaged? A. The rest of it was more or less tainted and damaged.

Q. When you say 1,000 bags were damaged, what opportunity did you have of observing that fact? A. Because they were almost totally destroyed—rotten.

Q. How did you form the opinion there were 1,000 bags damaged? A. I had them set aside, selected out as being stained to that extent; those were where the damage was perceptible on the exterior of the bags and the rest of the cargo was damaged by reason of contact with the damaged portion of the cargo. 267

Q. You looked at the 1,000 bags, did you? A. I did.

Q. Is it your opinion there were 1,000 bags in that pile? A. About 1,000 I would say.

Q. Describe a little more particularly the condition of those 1,000 bags? A. Some of those were totally destroyed, due to the damage by salt water which started fermentation in the rice and completely ruined it, rotted it so it was totally worthless. 268

Q. Would you describe the rice as rotted? A. As rotted, ruined. When rice comes in contact with salt water in the first place it becomes water-soaked; then heat, owing to fermentation, setting in swells the bags and it becomes heated, and dur-

269 ing that process it becomes almost as hard as a rock by caking, which afterwards by a continuous process of decay becomes like ashes, or meal, a pulverized powder.

Q. You have been describing what happens in general in cases of sea water damage I think? A. Yes, sir.

Q. Tell what you saw of this particular lot of
270 bags you have described in as caked condition, in some cases as sea water damaged, on a rotten condition and becoming like meal.

THE COURT: He has described already there were some of these bags that were rotted.

By the Court:

Q. You are speaking of the contents? A. Yes.

271 By Mr. Brown:

Q. Were any of the bags caked? A. A great many of them were caked, some of them were water-soaked.

Q. Actually wet when you touched them? A. Actually wet; they hadn't become caked quite yet; and others again, the gunnies were rotted off the contents.

Q. When does the caking take place? A. After the rice—rice is an absorbent, almost like a
272 sponge; adding water to rice will swell it about three times, take a cup of rice and put it into water and you will have a quart; and if the rice has, well, is not confined in any package it will swell without doing much of any damage beyond swelling up, and that is I mean for cooking and eating purposes. But where it is confined in a bag like that in a raw state and it can't swell it undergoes a heating process due to fermentation.

Q. How about caking? A. Then it naturally begins to cake.

Q. When the moisture dries? A. When the moisture dries, yes, sir.

Q. Was there anything unusual in these 1,000 bags respecting odor? A. Damaged rice always has a very bad odor, very bad.

Q. How was it in this case? A. It was almost a stench.

Q. It was unusually bad odor, was it? A. Yes, sir. 274

Q. Have you in your forty years experience come in contact with a great many cases of damaged rice? A. A great deal of it, yes, sir.

Q. Do they include cases of sea water damage, sweat damage and heat damage? A. Most cases have been of salt water damage, sea water damage. I have had cases in my experience of a sweat damage from cargo—and that was in the instance of the iron ship *Derigo* belonging to Mr. Sewall of Maine—I had an entire cargo, the whole 275 vessel was loaded with rice, no other cargo in the vessel, and there was a slight sweat damage from the drippings of the beams under the deck perceptible but it was so slight—that vessel had been out about twenty days, about forty days longer than this vessel, this steamer—in that instance the damage from the drippings was so slight that it was only perceptible by a few strains of a sort of slate color on a few bags on the upper tier immediately under the deck, but it was scattering all over the top of the whole cargo in that way while 276 here and there the water had dripped off from the beams onto the rice but no damage beyond that, and the rice wasn't damaged.

Q. You have expressed the opinion already that the 1,000 bags you saw were damaged with sea water. What reason have you for that opinion? A. The reason I have for that opinion is this: that the damage was not general throughout the cargo, it seemed to be only in one spot and I never have in all my experience come across so serious a dam-

277 Gustave A. Jahn.

age, that would indicate or lead me to the belief it was nothing else but salt water, you couldn't get water sufficient from the dripping of sweat in the vessel to produce that amount of damage on the rice, because of this 1,000 bags that I have mentioned nearly all of it was almost completely gone.

Q. Your opinion is that amount of damage was inconsistent with either heat or sweat? A. Yes,

278 sir.

Q. Was there anything in the odor to show whether it was sweat, heat or salt water damage? A. Decidedly.

Q. Tell how you can discriminate by the odor? A. The odor was precisely the same odor that I have noticed on all sea damage or salt water damaged rice.

Q. What is that odor? A. It is a smell of decaying vegetation, that is what it is.

279 Q. What kind of smell does sweat damaged, or heat damaged, goods have? A. The damage from heat, which arises from the heating of the cargo and so on as it is called, is generally a musty smell only.

Q. Is that easily distinguished from this smell you have described? A. Oh, yes, yes, the musty smell is easily perceptible like must in any other merchandise, while this here, is a stench or bad odor.

280 Q. Have you ever known a case of sweat damage where there was a large damage on one side of the ship near the wing and very little on the other side? A. I have not.

Q. What was the color of the damaged goods in the 1,000 bags? A. The color of the bags externally? They were all colors from gray to black according to the extent of the damage sustained by the bagging.

Q. Does the color indicate anything as to the origin of the damage? A. Not necessarily. The

damage in the package would naturally always appear on the outside of the rice if it has come in contact with water, or the package, it would naturally show on the outside of the bag just as soon as the decay has set in.

Q. You have said that in addition to the 1,000 bags or thereabouts all the rest of the cargo, or nearly all, was somewhat injured. From what was that injury? A. The injury to the contents of the 282 packages by reason of becoming permeated with steam or heat.

Q. What is known as heat damage? A. Is due to the steam and vapors arising from the damaged condition of the damaged portion of the goods, of the rice.

Q. How did those damaged goods look? A. The packages to all appearances seemed to be all right, the contents were.

Q. The bagging or covering you mean? A. 283 Yes.

Q. How about the rice itself? A. The rice itself was all tainted with the same smell and decolorization that was produced in consequence of the vapors, and so on, arising from the damaged portion.

Q. Could that damage, this discolorization and taint, have been caused in your opinion by heat or sweat alone? A. No, sir, it could not without the addition of water.

Q. That is, an actual influx of water without. 284 Is that what you mean? A. Yes, sir to damage it to that extent.

Q. What is your reason for that conclusion? A. My conclusion that it would not?

Q. Why couldn't that be a simple ordinary case of heat damage without water coming into the ship from without? A. It couldn't be damaged that way. As I say, it is the vapor and steam arising from the damaged portion that creates damage in the balance and permeates the whole cargo as it

were, because rice is absorbent and would naturally absorb anything of that kind from the rest of the cargo.

Q. There are cases of heat damages without water being taken in from the outside? A. There are, but not to that extent.

Q. Then your opinion is founded on the fact of the enormous extent of this damage. Is that it?

286 A. The seriousness, yes sir. Heated rice, a vessel coming into port with rice which is heated of itself, by reason of the length of voyage or anything of that kind, would not be general throughout.

Q. Throughout the hold? A. As it was in this instance.

Q. Do you mean it would be localized in one spot in the hold when you say it wouldn't be general throughout? A. I mean the rice heated in

287 that way, there might be one small portion of it that would be heated but it is an entirely different character of heat; the rice would be there and you could put your hand in it and it wouldn't be caked or hard or anything of that kind, simply musty, the same as take a bag of wheat or grain, put your hand into it and it may not smell as sound as the other portion, that is the only difference.

THE COURT: You are speaking more particularly of your examination of the bags

288 other than the 1,000.

Q. I am coming to the rest of the cargo which you say was off color and tainted? A. Yes, sir.

THE COURT: Could that have come from heat or sweat?

Q. "Sweat" I understand to be in, so far as damage to cargoes is concerned, the dripping of condensed moisture from the beams, deck and

sides of the vessel; and "heating" due to fermentation in the interior of the cargo. Is that the way the words are generally used?

MR. KIRLIN: I object to Mr. Jahn giving any definition of heat and sweat especially of sweat, because the Supreme Court of the United States has already in two cases defined what sweat is.

290

THE COURT: He can state what he understands to be the meaning of the term so we won't be confused in terms.

A. I have always taken it that "sweat" damage arose from the drippings as they call it of the water from the beams, that that was sweat of the ship that created the damage, not the sweating of the rice or the goods. That is as I understand it, and as I understood it. That is similar 291 to what it was in the *Derigo* at the time, that the damage sustained by that cargo, which was very slight, was simply from the dripping of the waters of the beams, which I call and define as damage by sweat of the vessel. And the heating is, according to my understanding of the term, the heating of the cargo without any introduction of any water or anything of that kind into it, without coming into contact with water; the natural heating of a cargo of rice or of any other material, 292 for instance, I believe the same thing applies to other cereals, other grain. But the salt water damage and damage of this character arises from the introduction of water into the cargo. This couldn't be damaged in that way by heat or sweat, not to such an extent as that has been damaged.

Q. Did you have any conversation with Mr. Miller, one of the port wardens, or any other port warden, or Mr. Tiffany, foreman stevedore of the Atlantic Stevedoring Company, about the time of

the discharge of the *Folmina* or soon after, with reference to the condition of your cargo or the origin or cause of the damage? A. Not to my recollection.

Q. Did you see and have any conversation with them at all at that time? A. Not that I can remember. I don't recall the name as familiar.

Q. Are you acquainted with them? A. No, sir,
294 I don't know that I am.

Q. Are you acquainted with this gentleman, Mr. Miller (who stands up)? A. I don't know.

Q. Did you have any conversation with this gentleman about the matter?

By the Court:

Q. Do you recall this gentleman's face? A. I don't at the moment. I have no doubt Mr. Miller knows me and I may know him but I don't re-
295 call him at the moment.

Q. Mr. Miller was formerly port warden I believe.

By Mr. Brown:

Q. Do you remember having any conversation with any person about the time in which you expressed your views as to the origin of the damage to this cargo? A. I don't doubt but what I did with a good many of them probably, a good many
296 people, because it was such an extraordinary damage.

Q. Did you express any opinion that it was sweat damage or heat damage to anybody? A. No, sir, not—I couldn't express any opinion other than the one I entertain, and that is based on the actual condition of things and that is was damaged by salt water and nothing else.

Q. How early did you form that opinion? A. Immediately upon seeing the goods.

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CROSS-EXAMINED by Counsel for Claimants:

By Mr. Kirlin:

Q. Have you a brother who looks after your shipments, or works with you in your business? A. Yes, sir; he is superintendent at the mill and looks after outside matters.

Q. What is his name? A. Ernest.

Q. Is he in court now? A. Yes, sir. 298

Q. What is this kind of rice you imported on this vessel—what is it called? A. It is called unclean or undressed Japan rice.

Q. Is it called rough Japan rice? A. It is also called rough Japan rice. It is called the uncleaned and undressed by the customs authorities here, that is the term generally used, they dont call it rough rice. The duty on that rice is a cent and a quarter of a pound and it is a rice that has had the husk or skin or outer cuticle removed from it so 299 there is nothing but the skin or third cuticle left. A term that is usually applied to rough rice in this country is the rice that still has the outer husk upon it, I am speaking now of domestic rice.

Q. What further treatment would this rice have to receive before it would be in proper condition to make rice pudding? A. It has got to go through a regular process of milling with the exception of passing through the hulling stones.

Q. It still has to have the cuticle taken off the 300 outside of the kernel? A. Yes.

By the Court:

Q. What color is it? A. A brownish color, slightly on a brown.

By Mr. Kirlin:

Q. When sound? A. Yes, sir. That is the term applied to it out there in Japan, they call it brown rice.

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Q. Is that rice imported for any other purposes besides those of milling? A. In that condition, rice in that state or in that condition of milling is imported for milling purposes only, because it couldn't enter into consumption in that state any more than wheat could be made into bread without first being made into flour.

302 Q. The reason I asked the question was you said you imported most of that kind of rice that was imported for milling purposes? A. Yes, sir.

Q. I inferred from that some was imported for other purposes? A. In a cleaned state, in a milled state, imported from Europe. Considerable of it has been imported in years past from England, Germany and Holland—principally from Bremen however. There is very little of that rice imported direct from Japan into this country in a clean state. The duty on the clean rice is two cents a

303 pound and on this, one.

Q. Leaving out of view the cause of this damage the actual condition of it as I have understood from you was that a certain quantity of bags were more or less decayed, and that the larger quantity had been injured by heating. Is that correct? A. It was all damaged, the entire cargo of it was damaged but only about 1000 was utterly worthless.

Q. What I want to get at is what the real condition was, leaving out of view the cause of it.

304 Was it a condition of decay as regards the 1000 bags, approximately that number, and heating and fermentation as to the remainder that were damaged? A. All of it was produced by—

Q. Never mind what produced it. Was that the result? A. I dont quite get your question.

Q. I dont want your opinion as to what caused it, but I want to know the effect.

THE COURT: The condition.

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Q. Was the condition one that had resulted from decay as regards the 1000 bags, or approximately that number, and fermentation or heat as to the remainder that was damaged? A. It was all damaged in consequence of the introduction of salt water. 305

Please leave that out.

THE COURT: Counsel is talking about conditions, not causes. 306

Q. (Read to the witness.) Was the condition one that had resulted from decay as regards the 1000 bags, or approximately that number, and fermentation or heat as to the remainder that was damaged?

THE COURT: That is the immediate cause, not the ultimate cause.

THE WITNESS: Kindly read it again. 307

Q. (Read to the witness.) Was the condition one that had resulted from decay as regards the 1000 bags, or approximately that number, and fermentation or heat as to the remainder that was damaged? A. It was the condition arising from the damage of the 1000 bags that produced the damage in the other, that is all there is to it.

Q. I don't want what produced it, I want what had been produced. 308

By the Court:

Q. Was the condition of the 1000 bags a condition of decay and the other a condition of heat? Is that what you mean? A. The other was a condition of fermentation and heat arising from——

Q. No matter what it came from. Was it a condition that came from heat or fermentation? A. Both.

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By Mr. Kirlin:

Q. And the 1000 bags were to some extent, or to some degree varying, I suppose, as amongst the bags that were decayed? A. They were pretty well gone, rotten.

Q. Decayed? A. Yes, sir. And that was the portion I selected that 1000 bags out of the entire cargo.

310 Q. That is exactly what I am asking about, as to the 1000 bags separated and set apart. The condition you found there—let alone what it was caused by—was a condition of decay and rot? A. That 1000 bags was selected out of the entire cargo and that was the condition of the 1000 bags as the rice was received into the storehouse; we only selected those that were of the worst character and description.

311 By the Court:

Q. We want to know the condition of the 1000 bags. A. The condition of those was they had decayed and rotted to a certain extent.

By Mr. Kirlin:

Q. And then there was another lot of damage in the cargo, you say? A. I say it was all damaged.

Q. Do you say the entire cargo was damaged?

312 A. Yes, it was all damaged, only some more seriously than others.

Q. All damaged, was it? A. Yes, sir.

Q. And that damage consisted of what? A Mostly salt water damage.

Q. No, don't tell me what caused it. Tell me what it was, what the condition was as you found it. A. I say about 1000 bags——

Q. Leave the 1000 bags out, we are done with those. The rest of the cargo was off color, you said? A. Off color, yes.

 313

Q. What else was the matter with it? More or less heated and under fermentation.

Q. It was not hot I suppose when you felt it in the warehouse, was it? A. No; it had all been hot.

Q. What I want to know is what was the condition that you saw over in the warehouse that makes you think heating and fermentation had been going on in that other part of the cargo? A. 314
What was there about it?

Q. Yes. A. Nothing more than examination would produce it. I was going to mill the rice, I know what it was.

Q. Tell us the condition you saw that makes you think that part of the cargo had been heated or fermented, tell us so we can understand it. A. What made me think so?

Q. What the condition was that made you think that cargo had been heated and fermented? 315
A. I didn't think about it, I knew it.

By the Court:

Q. Why did you know it? A. Why, from examining it.

Q. What was there about it that made you think so as you looked at it or felt it? A. As to the touch?

Q. Any way that you employed, Mr. Jahn? A. It was not a sound rice. 316

By Mr. Kirlin:

Q. Tell us what the appearance was that made you think it was unsound. A. It was the appearance made me think it was unsound.

Q. Can't you describe what the appearance was that made you think it was unsound? A. To the touch and to the smell.

Q. What was it to the touch that made you think it was unsound? A. I can tell the difference

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between glossy smooth rice and rice that is in the state in which this rice was discharged from the vessel.

Q. If you can tell it tell it now. A. If I had the rice here I could demonstrate it to you but I don't see how I can explain it to you exactly, I don't know just exactly what sort of explanation you desire of it.

318

By The Court:

Q. Sound rice if you touch it would feel one way and unsound or damaged rice another way. What is the difference? A. One would be smooth and glossy and the other wouldn't be quite so much so, little more on the rough.

By Mr. Kirlin:

Q. Is that all the difference there is as far as
319 taste and touch are concerned? A. That is all.

Q. What other difference did you say you saw —smell? A. Smell.

Q. Leave out of view the 1000 bags and tell what the smell was you noticed on the rest of the cargo? A. The smell was similar to that in the other gargo.

Q. Was it the smell of decay, incipient decay? A. It had the same odor.

Q. Was it the smell of decaying vegetable mat-
320 ter? A. Oh no; it had the smell of the—some of it merely had a slight taint, others not so much so.

Q. It was not the smell of rice I suppose? A. Yes, sir, it smelled like rice.

Q. It smelled different from sound rice you say? A. Yes, sir.

Q. What did it smell like—rice that had begun to decay, or heat, or ferment, or what? A. It smelled as though it had been in contact with decaying rice.

Q. It had an odor of decay, had it? A. Not much; some of it had.

Q. Won't you describe as accurately as you can in words what that part of the cargo——leaving out of view the 1000 bags—looked like as compared with sound rice of that quality and kind? A. What it looked like? Very similar to the other.

By The Court:

Q. To what? A. Very similar to the sound rice.

By Mr. Kirlin:

Q. There was sound rice amongst it? A. I am describing unsound rice in general. I am not speaking of that rice, I didn't discover any sound rice in it.

Q. As far as the appearance of it, and color, and so on, did it differ materially from sound rice? A. It didn't differ materially from the appearance of sound rice in the general view of looking at it.

Q. Then as regards all the rice except the 1000 bags it comes down to the difference in the way it felt to the touch and the odor you have described, does it? A. When it comes to the process of milling it is quite different, I was merely explaining to form the opinion the rice was in a damaged condition by putting my hand into it. Handling as much rice as I have, and milling as many thousand bags as I have milled and imported here, I have come across a great many instances of damaged cargoes of rice and I could almost tell at a glance with a touch the condition of the goods, which any one not quite as adept at it as I am might not observe there was any difference. That was simply in the appearance.

Q. Does the heating of rice from its own inherent quality affect the color of it? A. Not necessarily. Rice with age becomes a little off in color

and of course with the heating process it makes it much more so.

Q. Suppose a cargo of rice was stowed solid in a ship without any ventilation at all what would happen to it on a long voyage? A. I can only cite one instance that came under my experience, that ship Derigo, laden with nothing but rice came in here after a voyage of about 120 days—which is 40 days longer than this vessel had taken, 30 or 40 —and it came in in perfectly sound condition.

Q. Of course that was properly stowed and ventilated. I am asking about a different matter. I want to know if you had a cargo or quantity of rice confined and it heated what would be the result of it, what would be the condition that would result from it? A. If it was properly stowed and ventilated it wouldn't become damaged.

Q. Don't assume what I don't ask. I am asking about a quantity of rice in a confined place without ventilation, and heating set up in it? A. I thought you said something about properly ventilated.

Q. What result will ultimately came about in regard to it? A. If it is confined in a place, do you mean, in a vessel?

Q. No, anywhere—in a coal bin or any place so it is confined without ventilation and heating sets in. What happens to the rice ultimately? A. It would become slightly discolored. I don't know that it would become—I don't know how long you would have to keep it; I kept some rice for a couple of years or longer in sound condition and I don't know just how long you want to confine it.

Q. You know some cereals will heat? A. Yes.

Q. And rot from heating? A. Yes; that depends entirely on how they are taken of; if properly stowed and ventilated there is not any danger, I have carried them for years.

Q. If not they will rot? A. If people don't take care of their goods.

Q. Will they rot or not? A. I don't know as they would rot. They would rot if you added water to it and produced decay, but they wouldn't rot if they were kept in a dry place.

Q. Don't you know corn and wheat in a bulk will rot if it heats? A. I suppose it would. I don't know that it would. It has more moisture in it 330
I expect than rice would have.

Q. Wouldn't rice do the same thing? A. Probably would. I don't know.

Q. What experience have you had with damage that arose from fresh water—any? A. Yes, I have had rice rained on on lighters and rained on at the warehouses.

Q. If rice that is wet, whether it is by rain or by the sea, if confined it will rot won't it? A. When you soaked it, throw in the water and let 331
it soak I suppose it would; it depends entirely on the quantity of water that you would put on it. I have had rice damged slightly by being out on the lighters and rained on but no damage done to the grain.

Q. You have taken it off the lighters and put it in the warehouse I suppose? A. This rice we put into the mill.

Q. And separated it and it had an opportunity to be ventilated. You say you are interested in 332
rice mills in this country? A. Yes, sir.

Q. Are you acquainted with the process of curing rice? A. Yes, sir.

Q. Does rice like corn need to be preserved and dried before shipment? A. No, sir; not that I know of.

Q. Is it like wheat or rye with regard to the mode of curing it? A. When rice is cut in the field it is shocked for about two weeks; it passes

333 through the thresher, goes to the mill and is milled out, there is no curing process beyond that that I know of. I plant the rice and raise it on plantations on the farms down there and mill it and I distribute to the consumer.

Q. What is the first thing that is done to it? A. After it is raised in the field it is cut, harvested, and threshed, stacked for a few days and
334 threshed out.

Q. What is the stacking for? A. To give you time to get around with your threshing machine, and so on, to thresh it and at the same time, if that is what you are driving at, the curing part, as you call it, the drying out process. It is not necessarily held back for that purpose but it is always stacked—take a field of 2,000 acres of land it has been bundled up and stacked—they run along with it until they get a sufficient number of
335 acres cut to thresh it out. You can thresh out two or three hundred acres of rice in a very short time.

RE-DIRECT by Counsel for Libelants.

By Mr. Brown:

Q. What in your opinion would be the effect if a cargo of rice should be shipped that had not been stacked as you describe? A. If a cargo of rice had not been stacked? It is not customary
336 to ship a cargo of rice—I don't know how you are going to get it into condition to ship it without stacking it. It is the bundling up of the grain on the field the same as you do the wheat—you go along and cut your wheat and it is done up by the binder, put into stacks or shocks on the farm. You don't take wheat right from the stack do you, and ship it?

Q. Is it necessary, in your opinion, in order it should keep well during transit that it should be

stacked any particular length of time? A. People that are in the rice business always make it a rule to stack their rice a week or ten days, I don't whether it would make any material difference whether it was held back one week, three weeks or more, I don't know what the effect would be. It is customary with the farmer to stack his rice and leave it in the stack about a week or two, whether that is to make the rice perfect I don't 338 know.

Q. You were asked whether in your opinion rice that was wet and stowed without ventilation would rot and you said I think it would depend on the quality of water with which it was wet?

MR. KIRLIN: I don't think he said that.

THE COURT: He said he didn't know about corn and other grains but supposed it would rot.

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Q. Didn't you say something about the quality of the water? A. I don't know whether I did or not. I don't know exactly what that question was.

Q. If the cargo of the *Folmina* had been wet with rain water before shipment would that in your opinion account for the condition in which you found it on discharge? A. No, sir, it wouldn't have affected it in that way.

Q. In what different way would it have affected 340 it? A. The damage by rain itself couldn't have produced the seriousness of the damage such as existed in this instance, you couldn't get rain enough on the rice to remain on it; that is, if the bag was exposed during a shower of rain there wouldn't be rain enough soak in through that gunny to soak the bag and create that damage, because the rain would naturally run off from the bag, it wouldn't remain on it.

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Q. Would it present any of the characteristics you have previously described in your testimony as marks of salt water damage? A. No, sir.

MR. KIRLIN: I think we ought to know whether he has had any experience with this. He has not been asked about cargo wet by rain.

342 THE COURT: Counsel may ask the question.

Q. In your direct-examination you stated that the rice outside of the 1000 bags was off color. Did you mean by that that the color was different from sound rice on inspection before milling? A. The product after milling.

Q. Mr. Kirlin questioned you as to the difference between that other rice, excluding the 1000 bags, and the sound upon appearance before mill-
343 ing. Can you give any other difference after milling? A. A slight discoloration. Rice would not be quite so white in color where it had been damaged in that way.

Q. Was the value on the market affected? A. No, sir, not materially. The value of the rough do you mean?

Q. I mean was the value of the *Folmina's* cargo, outside of the 1000 bags affected by being off color and heated as you have described, compared
344 with sound rice? A. Yes, sir.

Q. Seriously affected? A. Very seriously affected.

By the Court:

Q. What did you do with the 1000 bags? A. Milled part of it here and part of it went to Europe.

Q. You took the 1000 bags which you have described as the worst, you milled the 1000 bags

here. A. I milled 1000 bags of the cargo here, that is before selecting out.

Q. Weren't the 1000 bags selected out at the warehouse? A. Yes, sir, they were set aside in the warehouse; but we commenced milling on that as soon as the vessel discharged without having waited until the whole cargo was discharged; we simply run 1000 bags into the mill to mill it.

Q. At the warehouse while the rice was there 346
you took out either all the time or little by little, part by part, that 1000 bags that you regarded as very bad? A. No, sir, your Honor. We took 1000 bags of the first of the rice that was discharged from the vessel, when the vessel first began to discharge irrespective of any selection.

Q. You have spoken of 1000 bags that were rotten? A. That was selected out from the entire cargo and set aside at the warehouse.

Q. What did you do with those? A. Part of
them were milled here and part went to Europe. 347

Q. Can you tell of those 1000 bad bags how much was milled here? A. How many of the bad ones?

Q Yes, of the 1000 bad bags how much of it was milled here? A. I could tell by my books. not by memory.

MR. BROWN: Our proof shows 66 of this 1000 were badly sea-water damaged, of those were milled here.

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Q. You sent part of the 1000 bags abroad? A. I can give you the statement, I can't tell from memory.

Q. Were these 1000 bad bags afterwards, the contents of them afterwards confused with the rest of it or was it kept separate? A The contents of the balance of the 1000 bags, of the damaged portion you are speaking of now, those I think were all exported, that is, what there was left.

349 Q. Was there any confusion? Did you keep those 1000 bags by themselves and mill them or dispose of them by themselves or mix them in with the good bags? A. No. When the vessel began first to discharge we took 1000 bags and sent it to the mill—1000 irrespective of any examination, just as the cargo ran—to the mill and milled it out and when we discovered the damage and the ser-
350 ious extent of it we concluded to export it rather than to mill it here, for this reason—

Q. Now, wait a minute. You took 1000 bags as the cargo was discharged and that went directly to the mill and was milled here? A. Yes.

Q. How did those thousand bags turn out? A. I could tell by my books just how they turned out, I can't tell from memory I have so much of it.

Q. Then you discovered they began to be bad and at the warehouse you first and last laid aside
351 1000 bags that were more or less rotten. Now when you come to send this to Europe did you take those 1000 bags, or some part of them, and put in with the others, or did you always keep those 1000 bags separate and sell separately? A. We consigned them to Europe and shipped them separately from the others under separate marks, although they were all examined on the other side by the Board of Trade or whatever it is in England there.

352 Q. You sent it as a bad lot very badly damaged? A. Everything was sent across separately, that is, so many bags of such condition, and so on, from New York. And the reason for exporting this rice to the other side—

Q. I don't care for that. I want to know if there was any confusion of the 1000 bags, as far as you know, with the 10,000 bags. I mean the rotten bags, the 1000 bags of rotten, that were laid aside more or less rotten, that left about

10,000 bags you said were deteriorated but not in such bad condition. I want to know whether all were mixed up together, or all exported at once, or whether you kept track of them? A. Oh, I understand your question now. Yes sir, they were kept separately.

Q. So you would get a separate return for the 1000 very badly damaged bags and a separate return for the other? A. Yes sir. 354

Q. What price did you get for the 1000 badly damaged bags? A. I couldn't answer that question without reference to the books.

Q. And your books would show what price you got for the better part of the cargo, A. Yes sir.

MR. BROWN: The 1000 badly damaged bags were all sold in England except the 66.

THE COURT: I think it is very important here when you show 10,000 bags were all 355 deteriorated to show, as bearing on the question of whether they were deteriorated, whether they sold for a substantially less price.

(The Witness.) They sold for a considerably less price your Honor.

Q. Do you remember that now? A. I couldn't be precise, your Honor. You know I can't make this statement without knowing, I don't wish to 356 guess at it.

By Mr. Brown:

Q. Did you have any conversation with Mr Miller or Mr. Tiffany as to the reason for your exporting this rice, if you remember? A. I can't recall any.

Q. You are stated as having said the reason you exported the rice was because it was a cent and a half or thereabouts depreciated in value and the

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American public wouldn't take it. Did you make any such statement as that? A. I don't recall making any such statement as that. I may have stated my reason for exporting it, which was simply this: that goods in the condition they were in and in that damaged state, and badly damaged state, the Government compels me to pay the duty of a cent and a quarter a pound upon every
358 pound imported without any allowance whatever for damage and it would have resulted in a much more serious loss to me had I been compelled to pay duty on all that damaged portion and get nothing for it to incur an additional loss of a cent and a quarter a pound which by exporting it to the other side was safe.

Q. Do you remember how it turned out as to the amount milled here? A. I couldn't recall those things from memory.

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Re-Cross by Counsel for Claimants.

By Mr. Kirlin:

Q. What did you do with the other part of the cargo?

The Court: What other part?

Q. The part you didn't export? A. I exported all except that 1000 bags that were milled here, I think about 1000.

360 Q. We have only heard up to now of 866 bags being exported. Did you export the whole 11,000 bags? A. I think so, I think they were all exported.

Q. You think so. A. I say with the exception of about 1000. I haven't the figures. I didn't come here prepared to answer these questions.

Q. You must remember the fact whether you exported the whole consignment except the 1000 bags that you milled at the beginning of the dis-

charge of the cargo, don't you? A. I think there were only 1000 milled here, about that. 361

Q. Do you remember when you exported the rest of it, the great bulk of it? A. It was all exported about the same time. I didn't lose any time to get rid of it, the longer I kept it the worse I would have been off.

Q. Did the proceeds of the sale of it come to you? A. I guess they must come to us, either us or the insurance companies, us probably. 362

Q. How could it come to the insurance companies? A. The sales from the European goods? Yes, that came to us.

Q. It came to you? A. Yes sir.

Q. Of all the European goods? A. I expect so.

Q. You don't seem at all certain about it. Can't you be a little more definite about it? A If you had told me what you wanted to ask me I would have brought a couple of my books and been prepared to answer the questions but I am not. I am not familiar with the details of the accounts of our establishment but I can get at it by reference to the books and accounts. 363

Q. Are you not familiar enough with it by recollection to know whether the money came to you or to the insurance companies? A. The money came to us.

Q. You have made no statement here of any difference in price realized? A. I expect we have the accounts made up and I supposed the attorneys had them as to the difference of value, and so on and so forth. I wish to correct that one remark I made there when you asked me the question as to whether the returns came to us, that is the returns from Europe out. My impression is the goods were exported through Richard Golf & Co., that is, to their house in England, as we had no direct connection there and I wasn't sure whether 364

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the remittances came direct to our house or through their house, to us, that is what I meant to say.

Q. You have said if this cargo had been wet by being rained on before shipment you thought the damage to it couldn't have been as serious as you found it on delivery. Wouldn't that depend on the extent to which it had been rained on? A. If
366 10,000 bags should happen to be rained on it would take a good deal of space to scatter them around. I don't know just how serious the damage might be.

Q. Leave out everything but the 1000 bags, those were the ones that were wet, the others were not wet were they? A. I don't know whether they were or not, I couldn't say.

Q. You have said that of the 1000 lot some of them were wet as I understand you? A. Yes sir,
367 I did.

Q. Whether those might have been rotted to the extent you found them rotted by being rained on before shipment, instead of being injured by sea water during the voyage as you assume, would depend, would it not, on the extent to which they might have been rained on? A. No sir, it couldn't be possible.

Q. Why not? A. Because any amount of rain you might put on there you would have to soak the
368 rice in order to produce the amount of damage that existed in this cargo.

Q. If it was soaked by being rained on the same condition might be produced? A. I don't know. I have never tried it and I don't know what the conditions could be. And I don't know whether they had rains in Japan at the time of the shipment of the cargo or not.

Henry Salter. 369

HENRY SALTER, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Brown:

Q. What is your business? A. Marine inspector for insurance companies.

Q. You have been engaged in that how long? A. Nineteen years.

Q. Prior to that what was your occupation? 370
A. I was with the Bureau Veritas for two years and better, then at sea for nearly sixteen years.

Q. When you were at sea in what capacity did you serve? A. From boy to master.

Q. How long did you serve as master? A. Little over two years.

Q. What are your duties with the Bureau Veritas? A. Inspector, assistant inspector.

Q. That is inspector of ships for classification? A. Yes.

Q. What has been the general nature of your 371
duties of inspection in the last nineteen years? A. Examining vessels of all classes and character for the protection of underwriters.

Q. Has it been primarily to discover the causes of damage and the extent of it A. In many cases, yes, sir.

Q. Are you familiar with the character and nature of sweat damage, heat damage and salt water damage? A. In a general way, yes; that is not my 372
specialty though.

Q. What was your connection with the damage on the *Folmina*? A. I was instructed by the firm which I represent, Messrs. Chubb & Son, to go to the *Folmina* and see what the cause of the damage to her rice was in my opinion.

Q. When did you first go there? A. The 17th of May, 1901.

Q. Where did you find that vessel? A. At—there are various names for that pier; I call it

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33, East River, new 33, East River, I suppose it is.

Q. Was the vessel in process of discharging? A. She was.

Q. Where was the damaged rice that you were sent to inspect, in what part of the vessel? A. No. 3 hold.

Q. How much of that hold had been discharged when you went there? A. Little better than a
374 third of the hold proper.

Q. Where was the level of the cargo at that time with reference to the stringer-plates? A. Take it on a level it would probably—which stringer-plate do you mean?

Q. You have referred to the third? A. Which one have you reference to now?

Q. I would like you to select one. A. One stringer-plate was covered; the middle one, the top of the bags on the level would probably be
375 perhaps three or four tiers under that stringer, under the amidships stringer, in the hold.

Q. You mean the middle of the three stringers? A. Yes, sir. In discharging the cargo, bag cargo, the stevedores usually dig down—which has been explained—four or five tiers to facilitate handling, so probably take that cargo at that time it would be, a little better than half of the hold would be full.

Q. Did you go alone? A. I did.

376 Q. Did you report your errand to the officers of the ship? A. I did.

Q. To which officer? A. Mr. Ogden reported, of our firm.

Q. To which officer of the *Folmina*? A. Oh, of the *Folmina*. No, I didn't see the officer. I usually—the custom is to find a stevedore or stevedores' foreman when cargoes are coming out damaged, and if it is necessary to get a permission I apply to the officer. I first ask for the captain, the chief officer.

Q. What did you do on the 17th of May? A. I don't remember that I asked either one of the officers. I went on board the ship, went up on her gangway—she was discharging off shore into a lighter. My first attention was called to a sling load coming up out of the hold, the end of the bag was completely bad or several of the bags, and it was running out into the hold. Then I called the foreman stevedore—I think his name was McCarroll, he testified on the stand, I never know them by name——and asked what the cause of that damage was, and as distinct——

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Objected to as to the statement of McCarroll.

Q. Leave out the conversation and take the next thing that happened? A. I asked him to locate where the damage was that it came from; he told me distinctly the starboard side of No. 3 hold, pointed it out to me and went down in the hold with me.

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Q. You went below? A. I did.

Q. What did you find the condition of things there? A. I went in the between-decks first, No. 3 between-decks, looked at the ends and overhead and examined the dunnage, as it was laid down loosely, and I saw nothing unusual about the position of the dunnage to warrant the condition of the bags as I saw them coming out, this is the between-decks Then I went down into the lower hold and I first examined the ventilation—I have had a little limited exerience with rice, and I wanted to see how the cargo was ventilated—and it seemed to be specially well ventilated in that hold; and then going down on the starboard side my attention was attracted to this: a little past the middle of the No. 3 hatch there was a whole bunch of bags there, the number I didn't count, that were very badly damaged not only on the

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tops but on the sides. Then after looking at that carefully I went to the other side, the port side of the ship, to look at the condition there where there were a few sweated bags; there was no such condition as I found on the starboard side. Then I began to look for the cause of it. I looked up under the deck all along the stringers, went up onto the stringers, put my hand down into the
382 stringers and found that the condition of the mats —drummer mats we call them, they use them in India and China—were sopping wet; and I went along further aft and they were still wet, the further I went along the wetter they got, when I got to the bulkhead aft they were sopping. After finding that that way I climbed up on the stringer on the other side and I didn't find the same condition, they were not wet to any extent, simply the ordinary sweat which would be natural on the
383 side of the ship.

Q. That is, on the port side they were substantially dry? A. Yes, sir.

Q. How far from the skin of the ship did you find the bags seriously damaged? A. I wouldn't swear to the number of tiers. My recollection is they were about three tiers in, from two to three tiers in.

Q. The damage extended how far fore-and-aft?
384 A. I believe about 25 or 30 feet; that is where I found the damage excessive I didn't count the bags or tiers or measure it.

By The Court:

Q. Were the mats wet on the port side? A. They were slightly wet, yes, your Honor, they were slightly wet from sweat.

By Mr. Brown:

Q. Was there any difference in the condition of the wet on the two sides? A. I considered it very marked; yes, there was.

Q. On the port side? A. They were slightly damp as they would be in all places.

Q. And on the starboard side? A. The mats were soaking wet.

Q. "Soaking wet," what do you mean by that? 386
A. You take a mat that is damp it is damp on the face of it, when it is soaking wet you pick it up and it is wet all the way through; a mat wont hold water like cotton but it will be wet and soaking.

By The Court:

Q. When you felt along the beams of the deck did you find water? A. It had all dried off; after a hatch has been open that way for a day or so 387
any sweat collected on the hatch would drop off or dry.

Q. Was there any water in the stringers? A. I didn't find any water in the stringers, the mats were soaking wet but there was no actual water.

By Mr. Brown:

Q. Did you at that time make an examination of the scupper-pipe, or casing around it, on the starboard side? A. I did not. 388

Q. At a subsequent time you did? A. I did the 7th of June.

Q. What was the location of that scupper-pipe? A. That scupper-pipe was as near the bulkhead as possible, within one frame, between the first and second frame from the bulkhead on the starboard side.

Q. Which bulkhead? A. The bulkhead between the engine-room and No. 3 hold.

389 Q. You stated from the place you first found the dunnage the dunnage in the stringer-plate became wetter and wetter as you went aft. Is that right? A. Yes, sir.

Q. Do you mea away from that scupper-pipe? A. Yes, sir, away from the scupper-pipe. The scupper-pipe is in the forward end of the hold and I worked aft to the stringer.

390 Q. When did you go again to examine the rice? A. I went on board to examine the ship on the 24th of May again, at the Erie Basin. At that time I was notified or instructed I should say. by the office that the ship had had a collision and that I had better go at once and see the cause of the collision and also make another visit and see if I could ascertain anything further as to the damaged rice.

Q. On the second visit did you go alone? ,A.

391 I did.

Q. Tell what hapened on that visit? A. I simply went over the ground the same as I did before I hardly thought—I will retract that. I simpy looked the side of the ship over to see if I could discover any possible place where there had been a leak to admit sea water either from the under side of the between-decks or side or any pipe or connection where I could locate an absolute leak.

392 Q. How was the cargo at that time—all out? A. The cargo was out, the dunnage had not been cleared up.

Q. Was it still left? A. It had been left in the same condition it was on my first visit except tearing down the bags which would naturally fall down.

Q. Did you see the officers of the steamer that time? A. I saw the chief officer that morning; he did not go into the hold with me, he gave me permission to go into the hold.

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Q. You asked him for permission? A. I asked him for permission that morning and went into the hold alone.

Q. Did you tell him what your errand was? A. I did.

Q. Was your attention at that time directed to the scupper-pipe? A. Not at that time, no.

Q. You didn't notice anything unusual about it at that time? A. Not on that visit, no. 394

Q. When did you go again? A. The 7th of June.

Q. Did you go alone that time? A. I did not, I called Mr. Davis. I requested, asked Mr. Ogden of our firm, or rather consulted with him, if it wouldn't be wise to take somebody with me to make a further examination of the condition of the ship and somebody in the office suggested Mr. Davis, and I proceeded with Mr. Davis. We went on board and went over the same ground which I 395 had done before to ascertain if possible the cause of what I believed to have been a leak in some part of the skin of the deck of the ship.

By the Court:

Q. Did you state whether on the 24th of May, you found any defect in the ship? A. I did not; no, sir.

Q. Did you find any? A. No, sir, I did not find any defect. 396

By Mr Brown:

Q. On your third visit did you see the officers of the steamer? A. We introduced ourselves to the captain before going below. I went to the cabin door—the head steward called for the captain—gave him my card and told him what my business was. He came to the door and I introduced Mr. Davis to him, told him what our visit was for and asked permission to go below; he

391 quite readily gave it, called his chief officer and told him to make preparations for our going below—also his carpenter.

Q. Did you ask him any questions about the character of his voyage? A. I did.

Q. What did he say? A. They were very conflicting, very confusing, I couldn't gather from his statement they had had anything unusual or un-
398 usually bad weather.

Q. Can't you remember his language? A. No I can not, except it was very indefinite as to the condition of the weather.

Q. Did he say he had had bad weather, or hadn't? A. The inference was he had not had bad weather. Probably I asked him if he had stranded— that is my usual question—or if she had been in collision or had specially bad weather.

Q. Your recollection is he did not complain of
399 any bad weather? A. That is my recollection.

Q. Did you ask him as to the cause of the damage? A. I don't remember asking him that. I didn't suppose it would be any use he wouldn't answer me any way.

Q. You don't remember his expressing any opinion as to the cause of the damage? A. I don't imagine I asked him anything of that kind.

Q. You don't remember his saying anything of that kind? A. Why, no. I wouldn't naturally
400 ask him such a question as that.

Q. Did the chief officer and carpenter accompany you when you went below? A. I think the chief officer, I am not quite clear; the carpenter and captain were with us when I went below. Our purpose was to examine the scupper-pipes and fill them.

Q. Why did you examine the scupper pipes? A. There was no marked indication of the skin leaking or any rivet being displaced or anything in the deck and the natural inference I had was

it may be some leak from a scupper-pipe and "now if we fill or flood that scupper-pipe we may possibly discover some leak."

Q. What did you do? A. We ripped the ceiling, ripped the covering off the scupper-pipe, ripped it off I think one length of board above the middle stringer.

Q. You are referring to the scupper-pipe in the starboard forward corner? A. In the starboard forward corner, that is what I have reference to, that is where I found the excessive damaged cargo; and I thought it might be some defect in the scupper, broken.

Q. The carpenter took off the board? A. The carpenter took off the outside board of the covering of the scupper, that was filled solid full of grain and mud and dirt, we had to clean it down, before we could fill it with water, so as to get at the pipe.

By the Court:

Q. You are speaking of the casing? A. Of the casing, yes, sir, around the lead pipe that protects the lead pipe from the cargo.

By Mr. Brown:

Q. The interior of the casing was filled completely full? A. Was filled completely full, so far as we uncovered it, almost solid full, so much so that we had to dig it out to get at the lead pipe.

Q. What was the contents of that casing? A. It is difficult to tell what it was; all kinds of cargo sifted in that dirt and stuff, clogged in there, there was some grain amongst it.

Q. What was its condition? A. Simply one mass of wet and sop just like mud.

Q. Was it extremely wet? A. You couldn't wring water out of it. You know what mud is,

405 the same as you take wet mud and take it up in your hand.

Q. Would you describe it as more than moist? Was it actually wet? A. I can't tell you the consistency or what percentage of water, I described it to the best of my ability.

Q. I want to get some degree to which you say it was wet. A. I can't give the consistency of it
406 what percentage of water was in it.

Q. Was it soft or hard? A. I have told you already, Mr. Brown, it was like soft mud, sticky like any substance would be confined in a place and being wet.

Q. Who was present when that was done? A. The captain and Mr. Davis and the carpenter and one or more seamen and myself.

Q. Did you call the attention of the captain to what you found? A. I did.

407 Q. What did he say? A. Absolutely nothing, non-committal he made no comment at all; in fact, he made no comment through the whole survey except to answer monosyllables, he gave us no information.

Q. Where was the forward board of that casing with reference to the cargo battens? A. The forward board?

Q. The board that was taken off? A. You can't
408 call it the forward board, the outside covering.

Q. What do you mean by "outside?" A. The pipe is encased in a casing and there is an outside board and side board.

Q. Is it formed of four boards—the casing? A. I am not quite clear whether four; there were three, whether there was a board at the back I can't say, sometimes there are and sometimes not.

Q. Each corner was a right angle? A. Each

corner was a right angle, yes; the outside board we took off to see the condition of the pipe. 409

Q. When you say the outside board you mean the one facing the center of the hold? A. That is the outside board.

Q. I call the outside board the board next the skin of the ship? A. How could you get it off?

Q. You couldn't. I am only criticising your language. I want to know what board you mean? 410
A. The board facing the skin of the ship.

Q. What was the position of that board with reference to the cargo-battens? A. Inside of the line of the cargo-battens.

Q. Did you have to take off the cargo-battens first to get at it? A. Certainly not, they are permanent.

Q. Were the cargo-battens behind it as you faced it? A. The cargo-batten can't be behind it when the board is inside of the line of the batten. 411

Q. It all depends on what you mean by the word "inside." A. Next to the skin.
the space between the cargo-battens? A. I don't
the space between the cargo-battens? A. I don't remember how it was taken off, I can't go into the details that way.

Q. Were the cargo-battens between you and the casing of the scupper-pipe when you liiked at it did they extend across the front of the casing as you looked at it? A. Yes. 412

Q. How close was the casing to the cargo-battens? A. I couldn't tell you, I couldn't give you the slightest idea of that part of it I didn't go into.

Q. You couldn't say whether half an inch or ten inches? A. I couldn't give you any idea; I didn't measure it and didn't look at it.

Q. In what manner did the casing pass through the stringerplates? A. I wouldn't swear to

413 that. It probably went, my recollection is it went straight down and covered the face of the lead pipe and it went behind the inside flange of the stringer, the board proper, the cover proper was close up to the flange of the stringer if my recollection serves me.

Q. Do I understand you that the board of the casing was in contact with the inner flange of the
414 stringer? A. That is my recollection, yes, sir.

Q. Do you remember anything further you did on this third visit? A. That is as far as I remember now, that is all we went there for, to try to find some cause of the leak.

Q. You made no fourth visit, did you? A. Yes, I went again in the 10th of June. The ship was all cleaned out at that time, the dunnage was all cleaned out and my recollection is that the floor was completely clean. I got along on
415 the stringer and looked very closely at all her rivets and butt-straps, not being quite clear in my mind as to the condition of the deck underneath, a water-tank, which was on the starboard side close to the bulkhead, the engine-room bulkhead of the No. 3 hold; I thought it mght be possible one of those bolts going down through the deck which held the watertanks may have become broken and possibly been replaced, and I examined very closely to see if it had been so
416 and I couldn't discover that it had been. That was my reason for going there on the 10th.

Q. Do you think it is possible that the vessel may have had a defective rivet without you discovering it? A. It seems to me so, yes, sir.

Q. Would any practical examination that could be made make it perfectly sure a person wouldn't skip a defective rivet? A. It is my opinion there could have been a defective rivet there and it had been hardened up and from the corrosion of the voyage you could hardly detect it. Of

course that is only a matter of one or more rivets; of course if there were a line of rivets or plates started it would be easily detected, but the matter of one rivet and the straining of the ship and a plate starting, it could be covered up in time, you wouldn't detect it. 417

Q. Would one defective rivet permit a seam to open between the plates? 418

MR. KIRLIN: I object, that that is becoming highly speculative and beyond the range on rebuttal. Capt. Salter has testified he made the examination and found nothing; made three examinations, examined all over the sides and found nothing. Counsel is injecting a lot of his own insinuations as to the possibility of something having occurred of which there is no proof.

A. Certainly not, I don't for a moment suppose it would open a seam. No sane man that has anything to do with ships at all would suppose that for a moment. 419

Q. Never mind about the insanity. In order to open a seam how many rivets must be started? A. You ask whether I thought the breaking or starting of one rivet would open a seam. I say "No."

Q. Would one defective rivet permit water to come in? A. Certainly, the size of the rivet. 420

Q. Through the rivet hole? A. Through the rivet hole. The deeper it is in the water the greater the force of the water.

Q. But there could be a seam or crack between the plates of the ship without the rivets being defective? A. I have known cases where seams admitted salt water without perceptibly starting the rivets.

Q. If there were such a crack between the plates

421 would that be readily detected on examination? A. I don't think so in every case.

Q. Did you make an examination of the manner in which the scupper-pipe was made fast to the between-decks at its upper end? A. My recollection of that is that the scupper-pipe was flanged down into the deck and then cemented right around over it possibly six or eight inches each side, that
422 is the recollection I have of it.

Q. If there had been on that voyage at some time a defect in the method of attaching the scupper-pipe between-decks could that defect subsequently have been repaired without your observing the place of repair? A. In the cement? Yes, I think so.

Q. How could it have been done? A. The ordinary process of putting cement down; it is not infrequently the case they cement in what is
423 termed the gutter of the ship where the cement gets broken from something getting adrift on deck that will break it off, or a certain strain will start the cement in the gutter and it is patched over; put a patch over that cement precisely the same as rubbing a brush of paint over a place where it is bare, and in the course of time water and dirt would obliterate everything of that kind.

Q. How long would it be before it was obliterated? A. That is simply a conjecture; I couldn't
424 give any opinion of that, not the slightest.

Q. In your opinion would it be in two or three weeks or a month, or several months? A. I think so, in a location of that kind, yes sir.

Q. If there was a defect in the method of fixing that scupper-pipe in the between-decks would that permit water to flow down around the scupper-pipe, instead of inside of it?

Objected to as speculative.

THE COURT: That simply shows what

course water would take if there was a hole somewhere.

MR. KIRLIN: It does not need any evidence for that.

THE COURT: I will take the answer.

A. I believe it would.

Q. If water had flowed down around the scupper-pipe and outside of the casing what in your opinion would have become of it, judging of the conditions you found when you examined the scupper-pipe and casing? A. My belief is it would have gone out into the hold. 425 426

Q. Would any part of it in your opinion have found its way into the stringer-plate gully? A. I believe it would.

Q. Tell how it would get there? A. Simply comes direct down from the deck, and if the ship was laying at all it would go direct into the gutter. 427

Q. What should take it outside of the casing? A. If you had a break in the scupper-pipe in the deck, that is outside of the pipe proper, it runs down outside of that; if it runs down outside of the pipe it has to have an outlet, if it doesn't get the outlet in the bilge as intended it gets it in the hold.

Q. What should prevent it from getting the outlet into the bilge—the mass of dirt? A. It can't if it goes down on the skin because the skin is tight, it must go on top of the skin. The scupper-pipe is to take the water out of the between-decks if any should be there and getting into the bilge of the ship away from the cargo and away from the skin. 428

Q. If any water had flowed down outside of the scupper-pipe and inside of the casing would the matter of dirt you found inside of the casing force it outside of the casing? A. It depends how much there was.

429 Q. Would the seams in the casing permit it to come out? A. Oh the casing is not water-tight, never is water-tight, it is simply put over the pipe for the protection of the lead pipe from cargo in the hold.

Q. If it came outside of the casing would it flow down until it found the flange, over the flange and into the gully of the stringer-plate? A. Undoubt-
430 edly would if the stringer was full, unquestionably if the stringer was full; or if there was any motion of the ship, if the water got in one section of the stringer in any great amount before it could circulate fore-and-aft it would overflow, it would overflow.

Q. Would it get into the gully? I think you testified the inboard side of that casing was in contact with one of the flanges? A. That is the way I recollect it.

431 Q. If the water came down that side it would naturally flow over that side and into the gully? A. That is the inference I had.

Q. That is your opinion? A. That is my opinion, put it that way.

Q. If it got into the gully what would become of it? A. If it overflowed, as it naturally would, it would go out into the cargo or go out into the hold.

Q. What effect on the water would the rolling of the ship in the seaway have? A. If there is
432 sufficient water in the gully to fill it or any part of it it would come out of the stringer into the hold.

Q. It would wash both ways, wouldn't it? A. Naturally so, yes.

Q. If that had happened would it in your opinion account for the condition of the bags as you saw them? A. That was my opinion that it would

Q. Is it still your opinion? A. That is my opinion it would; that is what I examined it for, for that very purpose.

By the Court:

Q. What is your opinion now? A. It would, yes sir. 433

By Mr. Brown:

Q. How wet were the bags? Were the bags of rice wet to the touch? A. Mr. Brown, I can't answer to that. I didn't examine them for that purpose, that is something out of my province in this case, it was out of my province in this case because there is a concern who examine the condition of the cargo and passes upon its nature and what the percentage of damage is, I don't interfere in those matters unless specially instructed. 434

Q. From your experience with sweat and from your observation of the condition of this cargo did you form any opinion as to whether this was sweat damage? A. My opinion was it was distinctly sea-water damage. 435

Q. What is your reason for that A. Because it was localized, so close together, all in a bunch; there was no other part in the ship compared to it in any way either in appearance or amount of damage.

By the Court:

Q. I see you allude to the injury on the port side as sweat damage? A. There was some sweat damage there, that was my opinion. 436

By Mr. Brown:

Q. What do you mean by sweat damage? A. Condensation from the top of the steel deck and the beams and sides of the ship from change of temperature.

Q. Is sweat damage ever as serious as the damage you found on the starboard side here? A. I didn't think so, I didn't consider it so.

437 Q. Does sweat damage ever extend inboard more than one tier from the side or skin of the ship? A. I never have seen it.

Q. Have you had considerable experience with sweat damage? A. Quite a little, yes. Nineteen years with underwriters gives a man quite a little experience.

Q. Have you had a great many cases of sweat
438 damage in that time? A. Yes, a great many cases.

Q. How often on an average do you suppose you have a case of sweat damage? A. I couldn't give you an idea of the time.

Q. Do you think it would be two or three times a year, or a dozen times a year? A. Oh, probably a matter of two or three times a month, and you might go on two or three months without seeing any.

439 Q. Did you call the attention of the captain to the condition of the dunnage in the stringer-plate? A. I did, personally.

Q. On which visit was that A. On the 7th of June.

Q. How did you do that. Describe what you did? A. I got up on the stringer and brought out some of the mats and showed to him and asked if he thought it could be possible that was sweat damage. I got up in the stringer and took
440 out—Mr. Davis was up on the stringer, I called to him to throw me down one of the mats, he passed down one of the mats, I took it to the captain and held it under his face and I said, "Do you think, Captain, it is possible, does it seem reasonable to you, that that is sweat damage coming from that location?"

Q. What did he say? A. Not a word.

Q. Which was the stringer from which that mat came? A. The middle stringer on the starboard side.

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441

Q. What is your opinion as to whether that could be sweat damage that caused that condition? A. I believe it was sea water damage. I didn't test it but I firmly believe it was sea-water damage.

Q. Was there anything to indicate to you what was the cause of the damage in the color of the mats? A. Not in the state it was then; it would be impossible with the muck and dirt mixed in, 442 the color of the mat wouldn't enlighten me at all.

By the Court:

Q. Did the amount of wet indicate whether it was sea-water or sweat damage? A. Yes, sir, because it was so marked in that space different from others that I looked at in the ship.

By Mr. Brown:

Q. Do you say it wat wetter than it would have 443 been? A. Yes, I say because there was more of it in that one location than in the other side.

By the Court:

Q. Does sweat damage ever wet a mat as wet as that was? A. No, sir, not in my opinion, I never have seen it.

Cross-Examined by Counsel for Claimants:

441

By Mr. Kirlin:

Q. Now, Capt. Salter, you made four visits to this vessel for the purpose of ascertaining for the information of the underwriters what it was that caused that damage, did you? A. I did.

Q. And you have been examining for underwriters many years haven't you? A. I have.

Q. And the object of your examination generally is to ascertain whether a condition of dam-

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age which is reported to you has been caused by any defect or leak in the vessel, is it? A. It is.

Q. And when you make your examinations it is your custom to make them thoroughly? A. I endeavor to do so.

Q. And you did so in this case? A. To the very best of my ability.

Q. You examined the between-decks throughout
446 in the No. 3 hold? A. I did.

Q. And the dunnage in the between-decks? A. In a general way the dunnage in the between-decks only.

Q. You found nothing there which in your judgment could account for the condition of the damage you found in the lower hold? A. I did not.

Q. Then you examined on all four of your visits carefully the rivetting and side plating in the lower hold? A. I did to the best of my ability.

447 Q. And finally on one occasion you went there and had the scupper-pipe uncovered and examined that? A. I did.

Q. And you found no defect in it? A. We did not.

Q. And you had it filled with water? A. We did.

Q. And you found no leak in it? A. We did not.

Q. You don't mean to indicate the opinion that there may have been an opening in the side plating without your having seen it, do you? I mean as an
448 actual condition existing at the time you made your examination? A. I hardly know how to answer that question except in my own way. From finding a mass of damaged cargo in one place localized in a ship and going all over that hold in reference, the common inference which any man of any judgment would say, "Why there is some cause for that damage, what is that cause?"—— and I examined the plate, riveting, as carefully as possible—and not leave it to myself alone—I called on the other gentleman, Mr. Davis, for him to ex-

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amine but I am still firm of the opinion that a plate, the lapping of a plate can leak and tighten up again so when you examine it here in port you can't detect it. We have a case right in this port now where it can be proven. And that was my opinion that there must have been some leak from such cause as that although I acknowledge to you I didn't find it.

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By The Court:

Q. In other words, you infer to a leak in the plate. Is that right? A. Yes.

Q. From the condition of the cargo and the extent of the injury to the cargo? A. Yes, sir.

Q. The localization of it? A. Yes, sir.

Q. And not from nothing you actually discovered in the construction of the plate itself? A. Yes, sir.

451

Mr. Kirlin:

Q. Do you entertain the view that it is possible for a joint in plating to strain and open so as to let in an appreciable quantity of water and to close again so it will not be detected by as careful an examination as you and Mr. Davis made of it and will not leak at the time of such examination? A. I think such a case can exist, yes.

Q. You think that possible? A. I think that is possible, I believe it is possible.

452

Q. I take it your opinion is that something of that sort is what happened here? A. That is my opinion.

By The Court:

Q. Then you didn't infer that there was any defect in the scupper-pipe or its connection with the between-decks? A. I didn't find any.

Q. You thought the water came through a leak

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in the side of the ship? A. I thought so afterwards.

Q. And not through defect in the scupper-pipe? A. I didn't look at the scupper-pipe first, that was not in the consideration.

Q. I thought your final conclusion was water got got through there. Do you assume a defect in the scupper-plate in your conclusion you reached
454 there? A. It is possible.

Q. What is your conclusion? A. I couldn't reach any conclusion, Judge, because I didn't find any.

Q. You just answered Mr. Kirlin you inferred this injury came through a leak in the side of the ship? A. It was possible, it was possible.

Q. Oh, it is possible. But I understood you to say it did come there? A. I couldn't swear for I didn't see it; but it is possible, it is possible.

455 Q. I understood you to say that was your final conclusion you reached? A. It is possible for that to occur.

By Mr. Kirlin:

Q. If the water entered the ship through a leak in the Butts as you call the place where the plates join which may have opened and let in water and closed again so as not to be leaking when you made your examination, that would have to be in the
456 lower hold to admit any amount of water wouldn't it? A. Yes. But I didn't say "butts," I said lap of a plate, the lap of a plate might leak.

Q. That is my error instead of yours, I thought you meant "but." A. No, sir.

Q. Call it whatever you do—a leak of that kind would have to be in the lower hold rather than in the between-decks in order to admit any appreciable amount of water? A. It would have to be below the between-decks; it might be in the between-decks or might be in the hold.

Q. Are you clear about that? A. I wouldn't swear to that; but a ship of that class, her between-decks would be below the line of water when she is loaded considerably, that is 2 or 3 feet.

Q. If she is deep loaded—A. If she is deep loaded, as she was in that case.

Q. My impression is it was testified that the between-decks was not below the water line as the ship was loaded? A. I don't think you asked me that question.

Q. No, not you, I say it was some testimony to that effect. I don't know. I am merely carrying the vessel in mind, the condition of the cargo, and believing the line of her between-decks would be little below the water line.

Q. It wouldn't be much anyhow? A. No, not much.

Q. And if the leakage is to be attributed to the kind of leak you now suggest you would expect that to be in the lower hold rather than up above the between-decks, would you not? A. Naturally I would suppose it to be close under the line of the between-decks or about.

Q. As matter of fact you did not yourself, after you had made your examination and tested the pipe, connect the scupper-pipe with the damage did you? A. Not after my examination of the scupper-pipe, no.

Q. You have spoken of the damage being localized as having a distinct bearing on the opinion you formed, yet I understood you to say that the damage extended lengthways of the hold for 25 or 30 feet? A. The damage extended along 25 or 30 feet lengthways in the hold.

Q. The whole hold wasn't more than 60 feet long, was it? A. 60 or 70 feet.

Q. Practically half the length of the hold then? A. The damage did extend along on the starboard side fully half the length of the hold.

Q. So it was not localized in such manner as the kind of leak you suggested was localized? A.

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Yes, I think it was, most decidedly I think it was localized, I can't refer to it in any other way.

Q. You have spoken several times of a stringer-plate and getting dunnage out of a stringer-plate, to which one did you refer? A. The middle one on the starboard side.

Q. You haven't referred at all to the upper stringer-plate nor to the lower one? A. I couldn't
462 examine the lower one because it was covered up on the first visit.

Q. Finally you saw it? A. Yes, we looked into the lower one; or rather I looked into the lower one, I don't believe Mr. Davis did, I think we confined ourselves wholly to the amidships one as the most probable.

Q. What now do you recall? A. The condition of the lower stringer-plates was very much better, there was nothing serious there, because the bags
463 in the lower tiers of that hold were in very good condition.

Q. Now let us come back a moment to the realm of speculation my friend indulged in to some extent. Suppose we assume a leak at the lap of the plates, how would water from that get over from that kind of leak on to the cargo? A. Why, if a lap of plate leaked or there was any leak in the side of the ship if it was emersed in the water it would spurt out into the cargo the deeper it was
464 emersed the more force it would have.

Q. The lap of the plates is perpendicular? A. I know, but the water gets into the lap of the plate, it forces its way in.

Q. If there was any spurt about it it would spurt up or down and not inboard? A. That is all right; but if there is any chance for water to get inside of a ship, no matter where, it will force itself in and the deeper it is the more force it has to go in.

Q. We are speaking of squirting; it would be up or down wouldn't it? A. Not necessarily.

Q. Did not the plates overlap far enough to be riveted? A. Yes, sir.

Q. They must overlap at least an inch mustn't they? A. Yes.

Q. Would not water which entered between the flat part of the plates at the overlapping if it squirted at all squirt on the plane of the plates? A. Yes, it would squirt inward most certainly.

Q. It would squirt on the plane of the plates? A. No, it would not; it would squirt inward, the angle of forty-five degrees. If you will allow me to explain I will show you. The side of the ship is never straight, any leak of that kind would naturally squirt up to an angle of forty-five degrees to be exact.

Q. That might have squirted over onto the cargo if there was enough squirt and got into the stringer-plate? A. It could.

Q. You don't assume leakage lengthways in the ship overlapping the plates for anything like 25 or 30 feet, do you? A. I do not.

Q. You would attribute the entrance of the water to some one space and its distribution there to what? How would you get the water distributed 25 or 30 feet? A. By the stringer, by getting into the stringer and filling the stringer.

Q. Where was it with reference to the stringer that you found the level of the cargo on the occasion you first visited the ship? A. How much below the line of the cargo?

Q. Above or below whatever it was? A. Oh, a matter of—some of the bags were close up to the stringer, close under the stringer, right along close to the stringer.

Q. There is an opening in the stringer-plate at every frame of the ship isn't there? A. I didn't find it.

Q. Did you look for it? A. I did.

469 Q. Do you mean to say there is no opening back of the reverse frames? A. I didn't find any.

Q. You dont testify there was none, do you? A. I told you I didn't find any.

Q. Did you look for it? A. I did.

Q. Do you mean to say the stringer was absolutely solid behind the back frames all the way along? A. Yes. Stringer-plates are made in
470 two sections and make a complete gutter.

Q. They are fastened on the back part? A. They are tight.

Q. What is behind that, between that and the side of the ship? A. Nothing.

Q. Doesn't the bottom part of the stringer-plate extend out to the side of the ship and isn't it riveted onto an angle bar and the side of the ship? A. I don't think it was in that case.

Q. Where do they get any strength? A. From the frames, and the face of the frames.

471 Q. That wouldn't be more than ten per cent of the strength that would be got if that bar was riveted to the side of the ship, would it? A. I don't go into strength and strain and that sort of thing, that is a question I didn't go into in this case.

Q. Will you testify there was no opening in the stringer-plates between the flange, which was at the back side of the gutter and the side of the ship? A. I didn't find any.

472 Q. That is as far as you will go on that point? A. I didn't find any.

Q. How did the case of the scupper-pipe get down through the stringer-plate? A. That was open, there was an opening there; there must have been because that was the forward end.

Q. You are not very definite as to whether the casing went down through all three of these stringer-plates or was in sections between the plates and only the pipe itself went down? A. No, I am not

clear on that. Fy recollection is it was put on in sections but am not positive on that. 473

RE-DIRECT by Counsel for Libelants:

By Mr. Brown:

Q. Have you intended to express an opinion, assuming the damage to be sea-water damage, as to the relative probability of that water coming through a seam in the lower hold in the side of the ship, or through a defect in the connection between the scupper-pipe and the between-decks? A. It might have been either one. 474

By the Court:

Q. Did you mean to express an opinion here? A. I can't express an opinion for I found nothing.

By Mr. Brown:

Q. As to the relative probability of the two explanations do you think one as probable as the other? A. I do. 475

By the Court:

Q. Suppose the water came through the side of the ship could it get into the casing of the scupper-pipe except by the fact that casing was not water-tight and it would go through the joints? How did it get into the casing, in other words, supposing the water came through the side of the vessel, and wet up these contents? A. Your Honor, I dont think it got in. I dont think the wet, inside of the scupper pipe got in that way, I dont think it got in that way. 476

Q. Could it get in that way so as to produce the amount of moisture you found there? A. From the outside? No, sir, I think not.

MR. BROWN: Is your Honor referring to a leak in the lower hold or the between-decks.

THE COURT: He said it would be more probable to be under the between-decks

477 Q. There is the stringer you refer to and the cargo was slightly under that when you went in? A. Yes, sir.

Q. In what part of the vessel would it be necessary the defect should be in the side in order to produce the condition you found there? A. It would be somewhere *here.*

Q. That is above the middle stringer? A. That
478 is above the middle stringer, that is the inference I had, and where I examined more closely thinking it must be somewhere along *here.*

Q. Between the first and second stringer? A. Yes, sir.

Q. You said it might be above the between-decks? A. It might be the top of the between-decks; at the top is a scupper-pipe coming down *here.*

Q. No, I am speaking now of the water coming
479 in from the side of the vessel. Supposing it came in from the side of the vessel could that defect be above the between-decks? A. To cause the damage?

Q. The damage down where you found it? A. No, I don't think so.

Q. Now suppose there were a defect at the point where the scupper-pipe comes up to the between-decks, that might let the water into the casing, that is your idea about that? A. Yes, sir.

480 MR. KIBLIN: Does your Honor mean at the joint?

THE COURT: Yes, at the joint where it joins on.

THE WITNESS: In this case assuming the leak was there on the side of the ship above the between-decks the water would come out of the pipe.

Q. That would involve both a defective side and a defective scupper-pipe, the two? A. Yes, sir.

Q. But if there were no defective scupper-pipe and the water came in from the side it would be from under the between-decks? A. Yes, sir.

Q. Mr. Davis says he found on the two lower stringers two inches of water on the 7th day of June, and you were with him? A. Yes, sir.

Q. Did you find it? A. I did not.

Q. Were you there together? A. We were.

Q. Did you look for it? A. I did.

Q. Did he call your attention to anything of the kind and claim then he found it? A. Not to my recollection, no, your Honor.

Q. You think the salt water got in there? A. Candidly I do, Judge, yes, from some source which I was not able to find.

Q. How did you think it got in? Did you come to any conclusion as to how the water got through? A. A defective rivet is what I concluded.

Q. A defective rivet in the side of the ship? A. Yes, sir.

Q. Suppose there had been defective rivets, could those rivets have been repaired before the ship got to port? A. If they were just at the water line they could.

Q. How could they have been repaired? A. They can put a tap hole to it, put a wooden plug in, if you find anything of that kind defective, a pine wood plug.

Q. How would they discover it, supposing the ship is coming from Japan and the water is getting through there how could this have been discovered? A. As I understood it in that vessel she loaded part in one place and part in another and if there had been any defect it might have been found before the rest of the cargo was in.

Q. But after they started, during the voyage

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while they were sailing, I suppose unless they put in somewhere it could be discovered?

MR. BROWN: The proof shows a great many ports of call.

Q. In the first place, assuming the cargo of rice was all in, how could they discover this
486 defect? A. They couldn't discover it. But when I speak of a defective rivet please understand just what I mean. A rivet is not necessary to be out entirely.

Q. I understand about that. But assumng now the cargo has been put in in Japan and the ship starts for New York. Now in the meantime, assuming that there was a defect there which was injuring this cargo, how was it to be discovered? A. It couldn't be discovered, not at that time,
487 not on the voyage, not if she came straight along it couldn't be discovered.

Q. Assume they put in somewhere with this hold full how would it show itself? A. You couldn't see it, you couldn't see it at all.

Q. Then the question is whether it should have been discovered before the ship started if it existed, or whether they would have to wait until they got here? A. If it was a marked defect in cleaning the ship on the outside if they saw the
488 rivet was out it would have been discovered.

Q. It is a question of discovering whether it existed at that time or they discovered it after they got here? A. Yes, sir.

RE-CROSS by Counsel for Claimants:

By Mr. Kirlin:

Q. If there was any defective riveting which was susceptible discovery by an ordinary inspection it is fair to assume it would have been dis-

covered by you and Mr. Davis, is it not. I don't mean to ask that in any flattering sense? A. I think so. 489

Q. You don't intimate any defective riveting as an explanation of this which might have been discovered by an inspection prior to loading, do you? A. I hardly know how to answer that question.

Q. Perhaps if you tell us what you mean by defective riveting that will answer? A. A defective rivet can be loose without moving or coming out. 490

Q. There were none loose, were there? A. We didn't find any.

Q. You saw no evidence of any rivets having been tightened up or anything done? A. We saw none.

Q. To go back again to your cross-examination. I understood your statement to be that you inferred there had been some opening of the joint at the lap of the plate during the voyage which had closed automatically after the water had come in? A. I believe that is possible with a ship straining at sea. 491

Q. And your suggestion about defective riveting I suppose is that riveting which admitted that wasn't close enough before, or something of that sort? A. That is my impression, yes, or my belief I should say.

Q. It seemed to be the ordinary riveting, did it not? A. As far as I could see. 492

Q. And done in the ordinary way. It had the ordinary appearance? A. To all intents and purposes, yes. Of course the ship was dirty and corroded outside and inside.

Q. That is not uncommon at the end of a long voyage? A. Not uncommon at the end of a long voyage.

493 Henry Salter.

By Mr. Brown:

Q. In your opinion could a defective riveting sufficient to account for the amount of damage be repaired without leaving traces you could have discovered? A. I believe so.

By the Court:

494 Q. Who would have to do it, what kind of a mechanic? A. It couldn't be done unless it was done by somebody on the ship; one of the engineers could do that, tighten it, he could tighten up a rivet.

Q. How does he tighten it up? A. He could tighten it up by hammering from the outside, often-times that tightens it or starts it out entirely, it depends entirely where the flange of the rivet is gone, on the outside or inside—more go from the outside in what is termed sheeting it goes more 495 from the outside than inside. It wouldn't be necessary at all to put anything behind it, you could tighten it up in that way if it was slightly slack from the outside.

By Mr. Kirlin:

Q. Nobody asked you whether you examined the riveting on the outside or not—did you? A. Yes, I did; I looked along on the outside on the 24th of May when I went up the gangway—the 496 gangway was on that side as she lay at the dock at Erie Basin—I looked all along that side as closely as possible to see if I could see any indication.

By the Court:

Q. Assume there was no defect and the scupper-pipe was inside of the ship how could the contents of the casing get wet in the way you have stated? A. I think that was wet, from some accumulation of wet, I think that possibly may have dripped

down from a little leak around the flange of the pipe in the between-decks and from voyage to voyage, not at one time but different times, the moisture dripped down and got into the dirt that collected in the casing. 497

Q. Do you think that drip you speak of if it was sufficient to make this condition inside of the casing, was sufficient to produce the damage you found to the cargo? A. No sir, I do not. 498

Q. Then in your mind that condition of the inside of the casing wasn't very material? A. No sir, no sir, it was not.

By Mr. Brown:

Q. Do you know of any other way for that material in the casing to become wet excepting by defect in the scupper-pipe or conjunction of the scupper-pipe and the between-decks? A. I do not.

Q. In your opinion might such defect be adequate to account for the damage to the cargo? 499
A. It wouldn't account for it, it would not.

Q. You think it would not be adequate to account for it? A. I don't think so.

By the Court:

Q. There might be defect enough to let the water in the casing but that defect wouldn't necessarily be large enough to let the water into the hold? A. That is it exactly. 500

Q. It might or might not; it might wet the inside of the casing without wetting in the hold as I understand it? A. Yes sir.

Balance of testimony to be taken out of court.

501 Frank F. Koehler.

DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN and Another,

502 AGAINST

THE STEAMSHIP "FOLMINA."

Deposition taken on behalf of the libellants, at the office of Messrs Butler, Notman, Joline & Mynderse, No. 54 Wall Street, New York, on the 4th day of May 1903, under the same stipulation as heretofore noted.

503

Present:
Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE,
By Mr. Brown and Mr. Thacher for libellants;
Messrs. CONVERS & KIRLIN,
By Mr. Kirlin for claimant.

FRANK F. KOEHLER, being duly sworn and examined as a witness for the libellants, testifies:

504

By Mr. Brown:

Q. Are you a member of the firm of Putnam, Kissam & Koehler? A. Yes, sir.

Q. What is their business? A. Appraisers and surveyors.

Q. Your partner, Mr. Putnam has already testified in this case? A. Yes.

Q. What experience have you had, personally, in the examination of damaged cargoes? A. A general experience extending over a period of twenty years.

505 Q. Have you had many cases of sweat damage under your eye? A. Yes.

Q. Also of sea water damage? A. Yes, sir.

Q. What is the character of damage of different kinds of moisture that the cargo may sustain in the hold of the ship? A. Damage by sea water; damage by sweat.

Q. Is there any other? A. There may be damage by heat. 506

Q. What distinction do you draw between sweat and heat? A. Sweat is direct contact of condensation of moisture; while heat damage is what you might call vapor through the cargo also due to moisture.

Q. What are the principal ways of distinguishing sea water damage from the other two kinds of damage? A. Where we are in doubt we apply the nitrate of silver test.

Q. How is that done? A. By taking a piece of 507 bagging or of the package in which the damaged article is found, of the damaged article itself, placing it in distilled water, and adding thereto a few drops of nitrate of silver.

Q. How can you tell from that test whether there is sea water damage or not? A. The water in the vessel becomes a milky white if it contains salt, if the article tested contains salt.

Q. And otherwise not? A. Otherwise not.

Q. What other method of distinguishing the two 508 kinds, if any, is to be regarded as reliable? A. The stowage of the cargo in the hold where the damage has taken place, a personal examination of the place where the damage is found; the nature of the damage.

Q. In those respects how would sea water damage differ from sweat damage? A. In effect there is very little difference; but we can tell when we go on board of a vessel and find that there is a great accumulation of sweat under her beams,

509 that the damage has been caused by sweat, and where we find no leaks through the decks we conclude that the damage is by sweat.

Q. Have you had anything to do with the examination of the cargo of the *Folmina* which arrived in May 1901? A. Yes.

Q. Just state what your connection with the *Folmina's* cargo has been? A. My firm was re-
510 quested by Chubb & Son, underwriters, to look after that cargo; damage being reported, and I was on board of the vessel, which was discharging at that time up in the East River, I think it was Pier 33, on May 16th. I was on deck and looked down the hold and found that there were a large number of badly stained bags of rice in the No. 3 compartment on the starboard side.

Q. Did you go alone that day? A. Yes.

Q. Do you remember what time of day you
511 went? A. I think it was in the afternoon.

Q. In making your examination that day what was your position? A. I merely remained on deck and looked down the hold I made inquiries as to the officers of the vessel, and was shown to a man whom I was told was the first officer. I asked him about the cause of the damage, being able to see it down in the hold, and also the damaged bags, or the cargo, being placed on a lighter alongside, and I think he was a foreigner——

512 MR. KIRLIN: Don't state the conversation.

Q. You asked the chief officer for the cause of the damage? A. Yes.

Q. Did he explain to you the cause of the damage? A. No.

Q. Did he give you any explanation at all? A. No, he appeared to be a foreigner——

MR. KIRLIN: Wait a minute; we don't want that.

513

Q. He didn't give you any explanation at all as to the cause of damage? A. No.

Q. Is that the entire extent of your topics of conversation with him, your asking for an explanation of the damage and his failing to give you any? A. Yes.

Q. How much of the cargo had been discharged from that hold when you went there on the 16th? A. I can only estimate it when I say a little more 514 than one half that was taken out of the hold.

Q. When you say you saw them taking the bags out, from your position on the deck, do you mean the upper deck or the between-decks? A. The upper deck.

Q. Were damaged bags then coming out? A. Yes.

Q. Could you tell what part of the ship they were coming from? A. I could see that they were taking bags from both sides of the vessel, as I 515 stood on the deck and looked down the hatch, and that they were coming on deck in slings.

Q. Did you see damage in the slings that came from both sides, or only one side? A. No, I saw damage only from the starboard side.

Q. And none from the port side? A. No.

Q. Did you find out anything further that day as to the condition or explanation of the damage? A. No, sir.

Q. When did you return again? A. May 17th. 516

Q. The following day? A. The next to the 16th, yes, sir.

Q. You went there about what time? A. I think it was in the forenoon that day.

Q. Alone, or with somebody? A. Mr. Kissam was with me.

Q. Your partner? A. Yes.

Q. What did you do that day? A. I climbed down the hatch, down in the hold.

517 Frank F. Koehler.

Q. Into the hold where this cargo was coming from? A. Yes, where this cargo was coming from.

Q. That was No. 3? A. No. 3.

Q. How were they discharging it? A. Taking it out in slings.

Q. Were they taking out a tier all over, or were they breaking down in one spot? A. Working
518 across the hold.

Q. So the cargo was approximately level in the hold at that time? A. Yes.

Q. What was the condition of the cargo? A. The general condition in the center tiers was good; and on the starboard side, extending quite a distance along, I found a great many bags that were very wet, bags were resting against the dunnage on the side of the vessel; I pulled some of these down in the hold and turned them over and
519 they were very hot and very wet.

Q. How far did the damage to the bags extend? That is, what was the location and extent of the damage? A. Do you mean fore and aft?

Q. I mean both ways, as far as you noticed it, fore and aft and how far inboard and how far up and down, if you are able to tell any of those things. A. I cannot tell definitely; I didn't make any measurements; so far as my eye went I should say it was probably twenty-five to thirty feet on
520 the starboard side, fore and aft.

Q. In what part of the hold? A. In about—it was near to the forward part of the compartment, forward.

Q. That is, you mean it extended from the forward corner for twenty-five or thirty feet aft of that point? A. Yes.

Q. Inboard from the side? A. Inboard from the side, yes; the outer bags were the worst damaged bags, and I could tell from one tier that I found there that the damage extended inboard

and that the bags that were next to the bags at the outside were quite wet as well; but the damage decreased, the water, rather, decreased, as the bags came inboard. 521

Q. Did the damage extend inboard in one place any further than in another place, or was it a uniform distance from the side of the ship? A. No; one side I found particularly that the damage extended in further; it seemed to form a little circle; it seemed to form, I say, because I wasn't there all the time. 522

Q. How far inboard did it extend at that place? A. About two to three bags.

MR. KIRLIN: Ask him how these bags were stowed.

Q. How were the bags stowed? A. Fore and aft.

Q. How far inboard did the damage extend at the forward edge of the damaged portion and at the after edge? A. Just the outer bag. 523

Q. Do you know the extent of the damage in a vertical direction, up and down? A. No, sir.

Q. How many horizontal layers of bags did you have an opportunity of examining while you were there that day? A. I should say three; of course the cargo was not absolutely evenly discharged; there were bags taken out here and there and different places; so I could safely say I saw three tiers of cargo. 524

Q. As to these three tiers was there any difference in the damage up and down? A. At that one particular place the damage extended in further; towards the end it seemed to become less.

Q. You have already described the character of the damage in a particular horizontal layer or tier; now the question is whether the next tier below, or the next tier above, could be described in the same way, or whether they were different?

525 A. Those I saw I should say were as I described.

Q. That is, each of them where the damage was the worst it would extend inboard two or three bags and graduate down to the end to one bag? A. Yes.

Q. Aside from this position you have described on the starboard side of the steamer, what other damage did you find if any? A. I went to the
526 port side of the steamer to look for damage there, and didn't find any; I mean to say I didn't find any damaged bags; I found bags that were stained, or one might say simply affected by the ordinary contact with stowage; but I didn't find any wet bags.

Q. Did you try them to see? A. I felt them and turned them over.

Q. You felt them with your fingers? A. Yes, sir.

527 Q. Did you feel the outermost ones, next to the skin of the ship on the port side? A. Yes.

Q. Were they wet? A. No.

Q. Damp? A. No.

Q. Perfectly dry? A. Yes.

Q. How many of them do you think you felt? A. I presume half a dozen.

Q. In different places here and there? A. Yes.

Q. Couldn't you tell which bags were wet by the eye, wouldn't they show a different shade? A.
528 Yes; but I wanted to make sure by handling them.

Q. Did you find any other indications in the hold that would throw any light upon the cause of damage? A. I found quite some wet dunnage in a stringer; I don't know how the water got there, but there was quite some moisture; water evidently.

Q. When you speak of the stringer you mean an approximately horizontal stringer plate next to the side of the ship? A. Yes.

529

Q. And that was on which side? A. The starboard side.

Q. What was its height with reference to the height of cargo that you were examining? A. I should say it was about waist high where I was standing.

Q. What did you find in that stringer plate? A. I found pieces of matting, used for dunnage, that were quite wet.

530

Q. Can you describe the degree to which they were wet, any more than to say they were quite wet? A. Well I should say they were thoroughly wet, or they were sopping wet to use an ordinary expression.

Q. Was the examination of the hull of the ship, to discover any defect, a part of your duties? A. No.

Q. How long were you on the ship on the 17th? A. Half an hour, more than that.

531

Q. You didn't return again? A. Not after that, no, sir.

Q. You didn't make any tests to determine whether the damage you saw was sea water damage or some other kind of wet? A. At that time?

Q. At any time; just tell us what you did in the way of testing for sea water. A. I made some tests of bags I cut on the 17th, but I feared to cut many bags in the hold of the vessel for fear of getting in trouble with the stevedores, because 532
if you cut a bag in the hold of the ship the rice runs out, and they get very much annoyed at it; but when the rice had been taken to Union Stores where it was being taken on lighters I overhauled 1,100 bags I think, then I took quite some samples because then no more harm could be done.

Q. These samples, both those you took on the 17th and those you took from the store, you tested, did you, with the nitrate of silver? A. Yes.

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Q. In the way you have previously described? A. Yes.

Q. What did you find? A. I found slight indications of salt in those I cut on the 17th, and very pronounced indications of salt in those I cut on the 24th in the warehouse.

Q. Was it a part of your work to distinguish the sea water damage to cargo from the other
534 cargo, and ascertain how many bags were sea-water damaged? A. Yes, sir.

Q. How many bags did you find to be sea water damaged? A. 876.

Q. When did you make that test and find 876 to be sea water damaged? A. After the examination of those bags on May 24th.

Q. That is, a few days after May 24th? A. No, I should say on May 24th.

Q. And those 876 bags, what became of them?
535 A. They were sent to England for disposition.

Q. Is that the entire number of sea water damaged bags that came out of the *Folmina*? A. No; a thousand bags of rice were taken out of the vessel and taken direct to the mill of the importers, and in that thousand bags sixty-six bags were found to be damaged by sea water.

By Mr Kirlin:

Q. What do you mean by 'found to be dam-
536 aged?'' Are you speaking now of nitrate of silver test? A. No; sixty-six bags were examined and found very damaged in a similar manner to the bags that we saw in store.

By Mr. Brown:

Q. You mean those sixty-six presented all the indications of sea water damage that the 876 had done? A. Yes.

Q. Then the number of sea water damaged bags would be 942? A. Yes, 942.

Q. You have described the bags on the *Folmina* that you examined in the hold as being extremely wet; just tell us in what manner the moisture or wet extended around or over or through the bags; considering each bag separately? A. The moisture extended from the side that lay nearest to the side of the vessel, in.

Q. Take, for instance, the place where you testified the damage extended inboard for two or three tiers; what would be the condition of the bag next to the skin o fthe ship? A. That was very badly stained; showed marked stains of water on it.

Q. Would it be also wet? A. Yes, very wet; and that extended through and communicated with the next bag.

Q. Would the whole of that bag be wet? A. The first bag the entire bag would be wet.

Q. Any difference in moisture on the two sides? A. More pronounced on the outside.

Q. The next bag. A. That would be affected, only one-half of that bag would be affected.

Q. You mean it would be wet on the outer side and dry on the inner side? A. Yes.

Q. Of course if that were the fact the damage would extend no further inboard? A. No.

Q. It wouldn't extend to the third tier? A. No.

Q. Did you intend to testify that there were some cases where it did affect a part of the third tier? A. Yes.

Q. In those cases where it went as far as the third tier what would be the condition of the bags of the second tier? A. The moisture penetrated through the bag to the half of the upper part of the bag and communicated with the third bag which it would stain in part and cause a blotch to appear on it.

Q. Then I understand you that the bags were continuously wet up to the limit of the wet por-

541 tion; that is, the affected portion; the wet part didn't skip any portion of any bag, but was all wet through till you got to the end of the damage? A. Not soaking wet, but it was damaged in part and would communicate to the furthest bag.

Q. You have been describing the condition of the bags that you pronounced by your nitrate of silver test to be sea water damaged, have you not?

542 A. Yes.

Q. I would like to know whether there was any other damage to the cargo of rice on the *Folmina* that you noticed? A. There were a large number of bags of rice that had discolored rice; where the rice was discolored; it was off color; the bags were not directly stained by water.

Q. Were those bags moist or dry, A. They were dry.

543 Q. What was the cause of the damage in those cases, if you have any opinion? A. I thought these bags were damaged by moisture or heat due to the moisture in the bags damaged by contact with sea water.

Q. What reason have you for that opinion of yours? A. Rice, when wet, becomes very hot, and communicates that heat to the rest of the cargo in that particular hold.

Q. If there had been no sea water damage in

544 that hold do you think this other damage which you call heat damage would have occurred? A. No, sir.

Q. Did you sort out the bags that were damaged by heat in this secondary way? A. There were 1300 bags taken to warehouse which were called damaged by the warehouse men; those I overhauled and picked out 876 as being damaged by contact with sea water.

Q. How about the number of bags that were

545

damaged by heat, did you take any notice of those? A. No.

Q. What can you say as to the amount of wet that you found in the bags on the starboard side of the *Folmina* being consistent with the explanation that they were damaged with sweat? A. I cannot reconcile it that they can be damaged by sweat to that extent.

546

Q. Why not? A. I do not think that sweat would wet them so thoroughly; neither do I thinp that the water could penetrate so far into the inner bags, if it was sweat damage.

Q. What is your experience on that point; have you any experience to guide you? A. Yes, I have seen many cargoes damaged by sweat and where there is sweat in the hold of the vessel I have always found that the outer tiers will absorb it and take it up.

547

Q. Have you ever known cases of bags being as wet as these were from sweat? A. Yes.

Q. In those cases have you known of the sweat penetrating to the interior as much as it did in this case? A No, no, oh no.

Q. What can you say as to the condition of the dunnage being consistent with or inconsistent with the theory of sweat damage? A. The dunnage was very wet that I found; that dunnage could also become equally as wet if damaged by sweat.

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Q. You don't think that furnishes any criterion? A. I don't think so.

Q. It is stated by many of the witnesses in this case, if not by all, that there was practically no damage through wet to the upper tiers of bags next the between decks; does that fact in your opinion furnish any criterion to determine whether or not the damage was sweat damage? A. Yes; I have always found that where there

is any sweat damage in a vessel it would be found on the upper tiers; I should say *in* the upper tiers.

Q. I think you stated that the damage did not extend completely throughout the length of the hold fore and aft? A. That is so far as my recollection serves me.

550 Q. Does that fact furnish any indication as to whether this was sweat damage or not? A. It is an indication to my mind that it was not sweat.

Q. Why not? A. If it was sweat damage the entire side of the hold would be affected.

Q. Have you any experience to guide you in that opinion? A. Yes.

Q What is your experience? A. It is that where damage by sweat is severe, as this was, all the cargo stowed up to the side of the vessel

551 would be badly damaged.

Q. You stated also that you found absolutely no damage bags on the port side? A. Yes.

Q. Does that circumstance afford any guide as to whether this was sweat damage or not? A. I think a very decided guide. If the sweat had occasioned the damage on the starboard side I feel confident we would have found similar damage on the port side.

Q Have you ever known cases of sweat dam-

552 age affecting one side only, and not the other? A. No, sir, never.

Q. Can you think of any explanation that would account for sweat damage on one side and not on the other? A. I couldn't explain it.

Q. What can you say as to whether in case of sweat damage there would normally or naturally be similar damage in the other holds, 1, 2, and 4? A. That would depend largely upon what cargo was stowed in the other compartments; I didn't examine those holds.

553

Q. In case of a similar cargo in the other holds? A. I don't understand.

Q. If the cargo in the other holds were of a similar nature you would expect just as much damage in the other holds if it was sweat damage? A. Just as much, yes, sir.

Q. What means did you find, if any, on May 16th or 17th had been adopted for the purpose of ventilating the cargo? A. I found stowed 554 through the bags of rice long boxes—they were not boxes entirely, there were two pieces of board fastened with short pieces of batten at intervals; these were in between decks for the purpose of affording a better ventilation, or giving air space, so to speak, to the cargo.

Q. What effect would that character of ventiation have upon sweat? A. It would carry off the heat, if any existed, from the rice; it would ventilate the cargo, so to speak. 555

Q. Would it make the existence of sweat damage probable or improbable? A. Improbable, decidedly.

Q. If the conditions of the ship and voyage were in other respects favorable for the formation of sweat, what effect then would this method of vetilation have? A. It would carry off the heat; it would be favorable for cargo, this method of ventilation.

Q. Would it tend to reduce the amount of dam- 556 age through the sweat, if there were any? A. Yes.

Q. The testimony of the ship's officers is that for a good part of the voyage they had the hatches off; what effect, if any, would that have upon the formation of sweat? A. It would have a very bad one; I mean it would be excellent for the cargo; where hatches are removed there is no opportunity for sweat to form.

557 Q. Do you mean that during the particular portions of the time when the hatches were off sweat could not form, or do you mean anything more than that? A. I mean to say that sweat cannot form when hatches are off, because the cargo is ventilated.

Q. After the hatches are put on again does the good effect of the time the hatches were off still
558 last? A. Yes.

Q. On what account? A. Because there is so much fresh air in the hold it takes some time for that to heat again, and form this moisture necessary to condense and form water to damage the cargo.

Q. Was the appearance of the bags when you saw them such as to attract attention to their damaged condition, or might they escape without the fact of the damage being noticed if one were
559 not watching for it? A. It would be impossible to escape notice.

Q. It was conspicuous then? A. Very conspicuous; very pronounced.

Q. What can you say as to whether cargo damaged by sea water may keep a substantially unchanged appearance for several days before the appearance of damage develops? A. That would depend upon the article that you speak of; if you speak of rice I do not think that if a bag of rice
560 had been wet it could have escaped notice at any time.

Q. The suggestion has been made that possibly the cargo might have been wet before being put on board the *Folmina;* is that explanation, in your opinion, a possible one? A. I don't think that it is possible; because the bags, as I saw them in the hold of the vessel, didn't show that general stained condition through the holds, but the stained bags were confined to the starboard side in this compartment.

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Q. If the bags had been damaged before being put on board what would you find? A. It is more than likely that they would be distributed through the cargo.

Q. Could they have been loaded on board without the officers of the steamer observing their condition, and making a notation of that fact in the bills of lading, in your opinion? A. It seems impossible that they could take them and not note any such damage.

562

CROSS-EXAMINED by Mr. Kirlin:

Q. Have there been many cargoes of rice brought to this port in recent years? A. I couldn't tell you that.

Q. Have you had occasion before this damage to examine any full cargo of rice? A. No, sir.

Q. Have you had any occasion to examine cargoes much in which there was a full hold of rice showing damage in parts of it? A. No, sir, I don't recollect.

563

Q. An importation of rice in large quantities from the far east has been somewhat unusual, hasn't it? A. Yes, sir.

Q. Had you, in point of fact, ever inspected a cargo of rice before this occasion, in which you found such a system of ventilation as there was in this cargo? A. No, sir.

564

Q. What fact did the presence of that species of ventilation indicate to your mind? A. A great care on the part of the vessel to prevent heating and subsequent damage.

Q. If it was shown that that was the usual way of ventilating entire cargoes of rice would there, in your judgment be a fair inference in that, that cargoes of rice were shown to be of such nature that they would be liable to heat? A. No.

Q. Have you ever examined any other kind or

565 Frank F. Koehler.

class of cargo which was supplied with that kind of ventilation? A. No, sir.

Q. It looks as though that kind of ventilation was supplied to overcome the possibility of damage which was not common to it in other cargoes, doesn't it? A. I couldn't answer that absolutely in the affirmative. It very often depends upon the carrier as to the care he takes of his cargo.
566 Some carriers will use more dunnage than is absolutely necessary, not because the article they carry is bad, but because they want to take better care of it.

Q. I think it has been testified in this case that this method of stowing rice with that kind of ventilation was usual. A. Maybe; you asked me whether I had come across it.

Q. You were down there on two occasions, altogether about how long? A. On board the ship?
567 Q. Yes. A. I should say about an hour all told.

Q. And on the last occasion your examination was principally in the hold itself? A. Yes, sir.

Q. Could you say whether at the time you were there on the 16th the discharge of the cargo had progressed to such an extent that the stringer beam to which you referred was uncovered? A. I didn't notice the stringer beam on the 16th.

Q. Did you notice any material difference in the level of the cargo in the lower hold between
568 your first and second visits? A. They had continued working so there must have been less cargo on the 17th; I believe they had continued working; I don't know that positively.

Q. You said the stringer beam was about waist high above the level of the cargo as you found it on the 17th? A. Yes.

Q. Should you judge from that that the level had been above the stringer beam or below it on the first day? A. It may have been above it: I can't say positively; I didn't remain on board.

Q. You didn't notice that ? A. No, sir.

Q. Didn't you, when you were making your examination there, associate this condition of the bags that were lying up against the dunnage with that stringer, in any manner? A. There was considerable moisture in the stringer, and it occurred to me that the water had accumulated there and communicated with the rice.

Q. Did you see any water actually standing in the stringer? A. No.

Q. Did you make a sufficiently careful examination of the bags in the after part of the hold to say definitely that there was no damage on those which were next to the dunnage? A. I went down to the after part of the hold and overhauled some of the bags there; I didn't find the stains on the bags in that part of the hold that I found in the forward part.

Q. Did you find any heated condition at all? A. I found a heated condition.

Q. In the back part as well as in the front part? A. A heated condition in the rear and a damaged condition in the forward part.

Q. You found the bags warm? A. Yes.

Q. And that is sweat? A. But not if cold air is admitted; but if you have hot air and change the climate or atmosphere outside of it, then you would cause condensation.

Q. Some condensation, in fact a good deal, takes place from sea water on plates, chilling them and making the interior surface cold? A. Yes.

Q. Whereas in this case the cargo was kept off from the sides of the plating and dunnaged with mats any condensation from the inequality of temperature between the warmer air which was in the body of the cargo and the cool air resulting from the water outside being cold, would naturally take place on the surface of this matting, would it not? A. If there was much air space, or any air space between the side of the ship and the mats; but

these mats were stowed quite close up to the side of the vessel.

Q. Were they stowed quite close up? A. They were stowed quite close up to the side of the vessel.

Q. You recall that the ship had cargo battens fore and aft? A. Yes.

Q. And these mats were inside of the cargo bat-
574 tens? A. Yes, there wasn't any great space; there was a small air space.

Q. There was a matter of three or four or five inches? A. Yes.

Q. And that air space might result in the condensation of sweat on the mats, mightn't it? A. Yes.

Q. And it was right along there, just inside the mats, that you found the most damage? A. Yes, sir.

575 Q. I understand you to concede that both the location of the damage and the extent of it are such as might have been caused by sweat? A. No, I didn't convey that; I didn't say that.

Q. You said that that was the place where sweat damage might be found, alongside the matting, did you not? A. No, sir.

Q. Did not you say that you had previously found, in your experience, sweat damage alongside the side of the vessel? A Yes, I have found sweat; but I am thinking you have reference to
576 this particular case.

Q. I am asking you now generally. A. Oh, yes, we have found sweat damage on the side of the vessel; there is no doubt about that.

Q. And this was on the side of the vessel? A. Yes, sir, quite right.

Q. So that so far as the place that the damage was found was concerned, it was a place where sweat damage might have been found? A. Yes.

Q. I have understood you to say also that the

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extent of it was not greater than the extent of sweat damage that you have heretofore met with. A. No, I said that sweat damage never extended so far into the cargo as this damage extended.

Q. I think I understood you to say that the extent of the damage did not afford any reliable indication as to the cause of it; did you say that, or words to that effect? A. I don't think I said that; I am quite sure I didn't.

578

Q. Didn't you say that you had known cargoes being as much damaged by sweat as this was damaged? A. Yes, I said that, but I didn't mean to convey that the damage was in the same position and condition as this was.

Q. You draw distinctions of different ranges, fore and aft? A. Yes, I draw them; if you will allow me to explain, where we have these East India cargoes considerable moisture has come on the deck of the vessel, and that moisture drops and damages the upper tiers, I meant to say that I have seen cargoes as badly damaged as this; but in different locations, through sweat. That is what I want to convey, if I didn't say it.

579

Q. Do you limit sweat damage to damage caused by the dropping down of water which has been condensed on the upper part of the hold? A. Yes, sir.

Q. Did you find the bags warm on the port side where you examined it? A. No.

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Q. So that on one side you found them warm and damaged, and on the other side they were cold and undamaged? A. Yes.

Q. What explanation should you suggest for that? A. The bags that were wet, that I found wet on the starboard side, were not only warm but they were very hot, very hot; the other bags—it was early spring time, it may have been a warm day; I don't recollect just how warm they were, or if they had any increased degree of warmth,

581 but they were not in the real hot condition of the wet bags.

Q. Did you happen to feel of any of the bags around in the amidship part of the hold? A. Yes, I suppose I did; I didn't pay particular attention to that part of the cargo, because it did not attract me, not finding any stains or damage there.

582 Q. There were a large number of bags, I understood you to testify, in which you said the rice was off color and the bags themselves were unaffected; did you say that? A. I didn't mean to convey that entirely, if I said it; I mean that the bags were probably mouldy or discolored, but they were not stained by water.

Q. These other bags then were discolored? A. Yes.

Q. And the rice you said was off color? A. Yes; you must bear in mind that I examined 1300 583 in warehouse, which had been set aside by the warehouse men as damaged by water; in these I found 876 that were wet; the balance, making up the 1300, were mouldy and discolored, but not wet by contact with water; those I eliminated.

Q. They were not wet at the time you examined them? A. No, sir.

Q. Might not some of those, or all of them, have been wet and dried out? A. No, sir.

Q. Why not? A. Because the stain would have been pronounced on them.

584 Q. You say they were stained? A. They were mouldy; they were not stained brown, or not a distinct stain; it was just a discoloration.

Q. Well, the bags were brown to begin with. A. They are not a dark brown; they are a burlaps color.

Q. Jute bags? A. Jute bags.

Q. When those are wet do they get darker colored? A. From the fermented rice; yes, sir, they get very dark.

Q. Why may not this rice that fermented or heated thus have been the cause of moisture or vapor spreading in the hold, instead of being damaged with the absorption of moisture from other bags, as you have suggested? A. To which bags have you reference? To all the bags?

Q. Those that you say were moulded and off color? A. I don't think that they could have heated; or I mean to say that the bags couldn't 586 have become off color to that extent by heat alone.

Q. If a bag of rice heats up and gets warm you said it would tend to create a vapor which would diffuse itself around amongst the cargo? A. Yes, sir.

Q. If the air is let in will not that vapor condense and fall on whatever is nearest to it? A. Yes.

Q. Then if there was any considerable amount of vapor arising from the heating of the rice, and 587 the hatches were open and cold air let in, why might not that condense and show all through the cargo? A. If you take off the hatches you permit the cargo to ventilate.

Q. You only let out the hot air and let in the cold? A. Yes, you reduce the temperature; that carries away the heat.

Q. Cold and heat produce condensation? A. Yes.

Q. If there is any moisture in the hold the cargo in the lower part heats, would not that moisture 588 be absorbed into the heated cargo and the cargo be in that manner made damp? A. You mean if there is any water or any moisture? Yes, sir.

Q. Well, it is fair to call that sweat too, isn't it? A. No; yes, yes, if it is occasioned by sweat, yes, sir; quite so.

Q. Do I understand that you undertake to examine the side of the vessel particularly, or any other part, for the purpose of determining the cause of damage? A. No, sir.

589 Frank F. Koehler.

Q. But you are, in point of fact, somewhat expert on the condition of vessels, as well as of cargoes, are you not? A. We don't profess to know anything about hulls of vessels.

Q. When you find damage on board which to your mind indicates that sea water has entered, it is only natural that you should look around for the cause of it, and I suppose you did so. A. Yes,
596 sir.

Q. Was any one else there, while you were there, who was examining the side of the vessel or deck or any other part, to ascertain where sea water had entered? A. No, sir.

Q. And you didn't ascertain? A. No, sir. If we find such conditions we report to our principals and they employ experts or surveyors who are competent to pass upon the condition of hulls.

Q. On the first occasion when you were present
591 how many samples did you cut off the wet bags for examination by the nitrate of silver test? A. Probably half a dozen; I don't recollect exactly how many I cut.

Q. On the second occasion how many samples did you take for that test? A. Oh, probably twelve or fifteen; those I cut in the warehouse.

Q. Beyond those two sets of samples I understand that you made no test of the bagging by the nitrate of silver? A. No.

592 Q. Your evidence here as to the nature of the damage to all the bags, except those which you tested by the nitrate of silver, is based on your judgment and opinion, having regard to the exterior condition, was it? A. Yes.

Q. Have you before had any cases of damage to rice? A. European rice; or rice that has come via Europe.

Q. That has come from a great distance? A. I should say from Calcutta via Europe; via Hamburg and Liverpool.

Q. Have you ever had any that presented such appearance of damage as this presented? A. Yes. 593

Q. It is a fact, however, is it not, that the importation of rice has been in comparatively small quantities? A. So far as I know, yes; but I don't profess to be confident at all about that.

Q. Did you make any nitrate of silver test of rice as distinguished from the bagging? A. Pieces of rice, lumps of badly damaged rice, yes; 594 I took some of the pieces.

Q. Did they show the same result? A. Yes, they showed the same result.

Q. The nitrate of silver test doesn't disclose anything beyond the fact that the article tested contains salt, as I understand? A. That is right; I wish it did.

Q. It doesn't show salt water? A. No, sir; I can tell you that frankly.

Q. The rice itself shows precipitate of salt in 595 chemical analysis, doesn't it? A. Yes.

Q. Does it contain a sufficient quantity of salt to be shown by a nitrate of silver test? A. I don't think it does; but I was going to add that most any article that you import, or have, or may pick up, will show some saline matter.

Q. Some of the bags on the port side, though not wet, were stained I believe you said? A. I meant discolored, due to ordinary causes in the hold of the vessel. 596

Q. What, for example? A. May be soiled through lying in contact with dunnage.

Q. They only lay in contact with mats, didn't they? A. Of course you haven't been down in the hold of these vessels; they don't put a mat all over; there are many places where there is no mat.

Q. I thought on rice cargoes they had mats over all the dunnage, laid so that they overlapped? A. Yes, but they don't. They are not very careful about placing the mats over.

597 Q. Was the discoloration of the bags, or staining of the bags on the port side very extensive? A. No.

Q. None of the bags which you examined at the mill were tested by the nitrate of silver test, were they? A. No, sir.

Q. Were any of the bags which were off color, as you have described it, included in the consign-
598 ment that was sent abroad? A. No, sir.

Q. Do you know what was done with them? A. Pardon me, I say no; I don't know; I know that 876 were sent across, and it is possible that some of the balance was sent over; I went out of town immediately after these examinations had been made, and I couldn't tell you positively what was done with that other rice.

RE-DIRECT EXAMINATION by Mr. Brown:

599 Q. Do you draw any distinction between stain and discoloration of the bags? A. Yes.

Q. Were the bags you saw on the port side stained or discolored? A. Discolored.

Q. They were not stained then? A. No, sir.

Q. You have distinguished in your testimony between sea water damage to bags and heated bags; can you connect the appearance of the exterior of the bag with your explanation as to whether it was sea water, or damage so as to connect the
600 staining of the exterior with the one kind of damage and the discoloration with the other? A. The bag damaged by sea water shows a positive distinct stain, and a bag that may be damaged by heat will merely be mouldy or discolored, without that defined stain.

Q. You spoke of certain bags in the after part on the starboard side being heated; did those bags, in your opinion, belong to the sea water damaged bags, to the heated bags, or to the sound bags? A. To the heated bags.

Q. Were the bags themselves mouldy or stained? A. Mouldy.

Q. You have testified on your cross-examination that in the case of other shipments of rice from the east and Calcutta by the way of Europe, you knew of cases in which the rice presented the same aspects as the badly damaged rice ex *Folmina*? A. Yes.

Q. Do you know what the cause of damage was 602
in those other cases, via Europe? A. Sea water damage.

Q. Was it sea water damage in all the other cases that you speak of? A. All that I have referred to.

Q. Were those other cases of acknowledged sea water damage, where the cause was definitely known? A. Yes; there was no doubt about it.

Q. You made the statement, I think, in your cross-examination, that excepting in those few in- 603
stances where you actually made the nitrate of silver test; your only criterion was the exterior condition of the bag; is that correct? A. Yes.

Q. Wasn't the appearance of the rice itself any criterion? A. Every bag wasn't cut; one could judge only by the stains and compare it with badly stained bags.

Q. In other parts of your testimony you have referred to certain rice being off color; was that or not a criterion of its damaged condition? A. 604
The rice that was off color was in the mouldy and discolored bags.

Q. That is the damage you attribute to heat, isn't it? A. Yes, sir.

Q. In those cases you did judge by its being off color? A. Yes, sir.

Q. You examined it and saw it was off color? A. Yes.

Q. You did that yourself? A. Yes.

Q. In your examination in chief I think you de-

605 fined sweat to be the condensation of moisture on the deck or sides of a ship; did you intend to restrict or qualify that definition in your cross-examination? A. No.

Q. Did you intend to limit it to condensation of moisture in the upper part of the hold? A. No.

Q. Doesn't sweat, where it occurs on the side of the ship, extend all the way down to the bilges,
606 on the skin of the ship? A. No; sweat, if it is found in the side of a vessel is invariably found in the between decks or in the upper part of the wings nearest to the deck, to the main deck; seldom if ever down below or lower part of the vessel, or down to the bilges.

Q. You were asked on cross-examination, I think, whether assuming the mats to be placed three or four inches inside of the skin of the ship, on the side of the hold with an air space between, sweat
607 would form on the mats; did you intend to testify that it would form on the mats in that situation? A. Yes, because sweat will form; if any sweat is found, it will be found on the mats in the first place, because the mat protects the bag from the dunnage or from the battens.

Q. Isn't sweat the result of condensation owing to cold? A. Yes.

Q. How does it get on the mats? A. Because it is between the side of the ship, where the cold
608 can come in or strike the heat in the hold, and it must naturally form on the mat first. The same condition applies as to cargo damaged by sweat dropping from beams; if the mats are placed over the top of the cargo it is natural that that sweat will first communicate to the mat from the deck, and then to the cargo itself.

Q. Did you mean in this case on the side of the ship the sweat would form on the skin of the ship and drop from there to the mats? A. The mois-

ture would penetrate; it couldn't drop from the side of the ship.

Q. You testified that you had known some cases of cargo as seriously damaged from sweat as this was, from what you considered sea water damage. In those other cases did you find the damage in a similar position? A. No; I found it in the between decks.

Q. Did you ever find a case of sweat damage 610
as severe as this in the lower hold? A. No, sir.

Q. Have you tested sound samples of rice with nitrate of silver? A. Yes.

Q. Does it show any reaction? A. Very faintly.

Q. Was there any possibility of mistaking the reaction that you got in the *Folmina* case from reaction produced from a sample of pure rice? A. No, sir.

Q. Did you also test sound samples of the *Folmina's* rice? A. Yes. 611

Q. And the same remark applies to that as to ordinary pure rice? A. Yes, the same.

Q. Have you, in your cross-examination, at any place intended to qualify the distinction that you drew in your examination in chief between sweat damage and heat damage? A. I don't intend to vary the examination in chief; I don't know whether any question was put that could do so; will you tell me what you mean?

Q. I am trying to find out what you meant by 612
the testimony in the question and answer which the stenographer will read to you:

> Q. Do you limit sweat damage to damage caused by the dropping down of water which has been condensed on the upper part of the hold? A. Yes, sir.
>
> Q. If there is any moisture in the hold the cargo in the lower part heats, would not that moisture be absorbed in the heated cargo

and the cargo be in that manner made damp? A. You mean if there is any water or any moisture? Yes, sir.

Q. Well, it is fair to call that sweat too, isn't it? A. No; yes, yes, if it is occasioned by sweat, yes, sir; quite so.

A. If a cargo was wet in the hold of the vessel,
614 from any cause, and that heating or moisture communicated with the rest of the cargo it would damage it; I believe that is what you wanted me to answer, or that is what you want an answer to.

By Mr. Kirlin:

Q. If there is moisture in the hold and part of the cargo is heated, that moisture will naturally be drawn to the heated cargo, and even-
615 tually, if there is enough of it, it will make that heated cargo damaged? A. Yes.

Q. And the extent to which that would occur would depend I suppose on the amount of moisture that there was in the hold? A. Yes.

By Mr. Brown:

Q. Doesn't heat follow moisture? A. To rice, yes.

Q. Isn't heat the result of moisture, or is it
616 the cause of it? A. The result.

Q. If you have a condition of heat present does not that heat attract to it any vapor or water which is circulating around in the atmosphere in that region? A. Yes.

Q. So that you think the heated portion tends to become moister and moister all the time? A. Yes.

Q. And it takes away the moisture from the rest of the cargo and makes it dry? A.

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I wouldn't want to qualify my opinion, it equalizes itself to the cargo.

Q. I understood you to testify in a different place that the sea water damaged portions heated, and then disseminated moisture through the cargo, resulting in heating the rest of the cargo? A. Yes.

Q. Do you wish to qualify that in any way?

618

MR. KIRLIN: I object to the cross-examination of the witness by his own counsel.

A. No.

Q. Is it possible that the process of heating, when combined with the attraction for moisture that you have previously referred to when cargo heats, any cargo could become as wet as you found the cargo on the starboard side of the *Folmina* to be? A. No.

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Adjourned to tomorrow, May 5th, at four P. M.

May 5, 1903.

Met pursuant to adjournment; same appearances as heretofore noted.

620

ALPHONSE H. THOMAS, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Brown:

Q. What is your business? A. I am a chemist.

Q. With what firm are you associated? A. Sherer Bros.

Q. How long have you been connected with them? A. Eight years.

621 Alphonse H. Thomas.

Q. What is your position with them? A. I am chief chemist.

Q. What is the line of business of Sherer Bros. A. Sugar chemists, and they make a specialty of analyzing damage cases.

Q. Is it a part of your business to ascertain the cause of damage in cases of damaged cargo? A. It is.

622 Q. Did you make an investigation into the cause of damage to a cargo of rice, arriving in May, 1901, per SS. *Folmina?* A. I did.

Q. Tell what sort of an investigation you made. A. I made a chemical analysis of it, and found that—I received a sample from Mr. Koehler, of Putnam, Kissam & Koehler, with instructions to ascertain whether or not it was damaged by sea water. I made a chemical examination for the amount of sodium chloride in the samples, and

623 found an excess of salt in the damaged samples as compared with the sound samples; my conclusion was that it was damaged by sea water.

Q. What sort of samples did you get from Mr. Koehler? A. There were three samples; they were taken, if I recollect right, from jars; he told me that these samples represented the samples I was to analyze for damage by sea water. My recollection at present isn't very clear.

Q. I understand you got three samples from

624 Mr. Koehler? A. Yes; two damaged and one sound; the sound sample was for a comparative test.

Q. What method did you pursue in making your analysis of these three samples, and what results did you get? A. The volumetric analysis as recommended by Fresenius and Sutton.

Q. In a general way give the operation. A. The sample is first burned to an ash and the ash is carefully removed to a beaker by means of dis-

tilled water that has been tested for chlorides. Then it is titrated against a standard solution of silver nitrate, and the amount of salt is determined from the calculation of the results.

Q. Does that enable you to say what percentage of salt your sample originally has had? A. Yes; that enables me to find the amount of salt.

Q. I understand you that you performed that test in each of these three samples? A. Yes, I made the same tests in each case; the three samples, sound and damaged.

Q. What result did you get in the case of each of these three samples? A. In the sample of the sound I found 00.006 of 1% of salt; in the damaged sample marked "Pile No. 1 166 bags *Minnehaha,* 3rd sea damage, damaged sample" I found 00.0429 of 1%, or, making it more plain, a little more than 00.04 of 1%.

Q. You have now given us the result in each of the three? A. I have given you one sound and one damaged; the other damaged sample had 00.0420 of 1%, or a little over 00.04 of 1%; both damaged samples had apparently the same amount of salt in them, and the sound sample had about seven times less amount of salt than the damaged; or the damaged sample about seven times more salt than the sound.

Q. How was the third sample marked? A. Marked "62 bags *Minnehaha,* sea damage; damaged sample."

Q. Did you make any analysis of the bagging as well as of the rice? A. Yes, I made a qualitative examination of the bagging, and I found as follows "G A J & Co 2 Pile No 14X" sound sample gave a faint trace of salt; a faint trace, please notice; "G A J & Co No 14X" damaged sample gave a trace; that is to say, gave more than a faint trace. You see there is a faint trace and a trace, to distinguish one from the other; this gave

a trace. Sample "G A J & Co 5 Pile No 12X" sound sample gave a trace, and the sample of damaged, the same mark, gave a trace. I couldn't distinguish the difference between those two, that is by appearance, to the eye, in noticing that chemical reaction. "G A J & Co 6" sound sample, didn't show any evidence of salt; whereas the damaged gave a distinct evidence of salt;
630 very distinct.

Q. In the case of the bagging you made no quantitative analysis? A. No, none whatever; just a qualitative test.

Q. Are you familiar with the action of sea water on rice? A. Well, I have seen a good many cases, but I couldn't quite distinguish them myself from fresh water, very well; it is not my profession to distinguish between the two.

Q. Between sea water damage and fresh water
631 damage? A. No; I don't, as a rule; I don't believe, personally, that there is any way of telling between two samples if they are both damaged, one by sea water and one by fresh water, by appearance.

Q. You mean without a chemical analysis? A. I mean without a chemical analysis.

Q. But I am including in my question all methods of examination or testing. Are you familiar with the results of the sea water damaged goods
632 enough to compare with fresh water damage to goods and undamaged or sound goods? A. Yes, in that respect, yes.

Q. From the results that you have obtained there, what damage, if any, was received by each of the samples?

Objected to on the ground that there is no sufficient foundation laid.

A. That was damage by sea water; that is my conclusion.

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Q. Is it your opinion that the sample which you say showed 00.006 of 1% of salt was damaged by sea water? A. No; that was a sample of sound rice.

Q. I was asking for each of the samples? A. I beg your pardon, no; two of them gave evidence of sea water, and the other had no evidence of sea water whatever.

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Q. From the tests that you made of the bagging could you tell whether the bagging had been damaged with sea water, or not? A. Yes, I could; in one sample of bagging it was very evident that it had been damaged by sea water.

Q. How much salt in general does the sound rice contain? A. The sound rice contains little or no salt, and at the outside not more than 00.009 of 1%. Some samples don't give any action of salt; other do. The average is from 00.006 to 00.009 of 1%. When I say "no salt" I mean there is no appreciable amount that can be ascertained.

635

Q. Can you state how much woud be a maximum amount of salt that the rice could absorb from contact with sea water? A. I made an experiment to that effect, and I found that 00.16 of 1% is the maximum amount of salt that rice would absorb; the amount of salt that rice would absorb out of sea water, by immersing it for twenty-four hours in a beaker of salt water I only saw 00.16 of 1%.

636

Q. Do you mean sea water? A. Yes, I mean sea water; the sample was obtained from the beach at Coney Island; personally.

By Mr. Kirlin:

Q. How do you express that decimally? A. 00.16.

637 By Mr. Brown:

Q. In what proportion did the sample that you soaked in sea water for twenty-four hours exceed, in its composition of salt the two damaged samples that you took from the *Folmina*? A. It had just about four times the amount of salt.

Q. Were these test of yours performed in collaboration with anybody else? A. Yes, with Mr.
638 Edward Wolfbauer.

Q. Do you know where he is at the present time? A. I do not.

Q. Do you know whether or not he is in New York? A. I do not.

Q. He, at that time, was in the employ of the Sherer Bros? A. Yes.

Q. When did he leave their employ? A. Shortly afterwards.

639 Cross-Examined by Mr. Kirlin:

Q. As I understand it you examined three samples of rice? A. Yes.

Q. One sample was treated by you as sound rice, and two samples as damaged? A. Yes, sir.

Q. I wish you would express decimally the percentage of salt that you found in what was handed to you as a sound sample? A. Yes, sir.

Witness puts on a paper "00.006%."

640

Q. Now how much rice did you have of the sound sample? A. I had about the same amount as the damaged samples.

Q. How much did you have of the damaged samples? A. Well, I should judge I had about two lbs. I guess; about that; two or three lbs; I could measure it more than I could weigh it; I had about a jar of five inches deep by three inches in diameter.

Q. You have given the marks that were on

those samples as they were handed to you? A. Yes, sir.

Q. And beyond that you have no knowledge of where they came from? A. Well, I obtained them personally from Mr. Koehler.

Q. All you mean to testify is that Mr. Koehler gave you some rice and you sampled it with the results which you have stated? A. Exactly.

Q. Now the first damaged sample that you examined showed a certain percentage of salt, and I would like to have you express that decimally. 642

Witness puts on a piece of paper 00.0429%, and stated that it was marked Pile No. 1, 166 bags *Minnehaha* third sea damaged; damaged sample.

Q. Now give the like decimally expressed as to the percentage of salt that you obtained from the third damaged sample? A. 62 bags *Minnehaha,* sea damaged, damaged sample 00.0420%. 643

Q. You might give the decimal expression of the result that you obtained from immersing some of the rice for twenty-four hours in sea water? A. 00.163%.

Q. To take a concrete case, how much salt would there have been in a hundred lbs. of that damaged rice, if the whole hundred lbs. were of the same quality as the 2d damaged sample that you have tested? A. It would be about 00.04 of a lb. 644

Q. Which sample was that? A. That is 00.0420, the second sample.

Q. All that your test determines is the presence of salt in the rice? A. Salt in the rice.

Q. Whether that comes from salt water or something else your test doesn't disclose? A. No, it does not.

645 Alphonse H. Thomas.

Q. How many samples of bagging did you test altogether? A. Six.

Q. And of these how many were handed to you as samples of damaged bags? A. Three.

Q. Did some that were handed to you as samples of sound bags show a trace of salt? A. Yes; one gave a trace and another gave a faint trace, and another didn't give any evidence of salt.

646 Q. Of the damaged samples? A. One gave a trace and the other gave a trace, and the other one gave a distinct reaction of salt. I tested the sound and damaged samples right together you know, at the same time, and in one case the damaged gave a trace as compared with a faint trace of the sound; and in another case both sound and damaged gave a trace; in the third case the sound didn't show any evidence of salt and the damaged gave a distinct evidence of salt.

647 Q. Have you ever made a quantitative analysis of jute? A. No, not that I recollect of.

Q. Do you know whether bagging, such as this was, is made of a material which contains salt? A. Yes, it has salt in it. I have made a qualitative test of jute.

Q. That you have just testified to, do you know whether the material of which these bags were made contains salt? A. Yes they do contain a trace of salt; a very small amount of salt; that is

648 why we always require a sound sample as well as a so-called damaged sample, to determine whether it is damaged by sea water.

Q. One of these sound samples of bagging showed no trace? A. Certainly; when I say—I shouldn't say all, but most of jute or bagging does contain salt; some samples do not show the evidence of salt.

Q. If you had tried this second damaged sample by the qualitative test what amount of reaction

would it have shown, in your judgment, taking into account the amount of salt that you found in it by the quantitative test? Would it have shown a trace, a faint trace, or a distinct reaction? A. I would call that a little more than a trace; that is, in a chemical term, although to speak in figures it is much more than a trace; a trace is something less than 00.002 of 1%; much less than that; so I say that it is much more than a trace; yes, I could 650 say very much more than a trace.

Q. Won't it show what you class as a distinct reaction? A. Yes, a distinct reaction; that is very true, a distinct reaction.

RE-DIRECT EXAMINATION by Mr. Brown:

Q. Could the condition that you found to exist in the two so-called damaged samples of rice and in the last sample of bagging which you tested, be 651 accounted for in any other way, in your opinion, than upon the hypothesis of sea water, or on that of a deliberate admixture of salt? A. No, no, no other way.

By Mr. Kirlin:

All you mean to say is that salt must have got on it in some manner that you don't know, isn't it? A. Well, I do not know of any other means by which those samples could contain salt than by 652 sea water damage.

Q. You say that all your tests determine is the presence of salt? A. Exactly.

Q. And you have no means of knowing at all how the salt got there? A. I have no positive means, no.

Q. Your tests don't disclose anything on that subject? A. Well no, but—no, I had no other means; I find so much salt there, and I don't see how salt could get there outside of being damaged

653 by sea water or by being put there intentionally, or I can give a hypothesis that if you scrape it along the ground you wont get that amount of salt in it, and on the other hand you wont obtain that amount of salt from sweat damage, and I didn't see anywhere else you could get it unless he intentionally put salt there, or by sea water; there
654 is no other way of getting salt in it, and it don't contain that amount of salt if it is sound. I am referring to the damaged samples; so my conclusion was that it was put there intentionally or has come in contact with sea water.

By Mr. Brown:

Q. You have mentioned sweat damage. Have you had familiarity with cases of sweat damage? A. Yes, I have.

655 Q. In cases of sweat damage is there any increase in the amount of salt that a substance naturally contains? A. No; in fact it would be diminished, because the percentage of water is increased, and therefore lessens the percentage of salt.

Q. Are you familiar with cases of heat or fermentation damage? A. Yes, I have seen cases that were supposed to be damaged by fermentation; heat damage or sweat damage.

656 Q. As to heat damage what can you say there in respect of the saline constituents of the samples? A. The proportion is liable to diminish and not increase.

Q. You have mentioned heat damage and fermentation damage; are those two kinds the same, or are they different? A. Well, they are somewhat different.

Q. Under what condition is fermentation brought about? A. Fermentation is brought about by an appearance of moisture and heat.

Q. Would the conditions be favorable to that kind of damage in the sides or edges or corners of a hold, or in the center of the hold? A. Damage by fermentation is more liable to be in the center; more central.

Q. Why is it more likely to be there? A. There is more heat in the center of the hold and that is likely to condense the amount of moisture in the atmosphere, and in that way would start fermentation, provided there is enough heat and moisture to furnish it. 658

Q. Does fermentation, by its activity, cause or generate heat? A. It does.

Q. If a vessel should receive some injury where it admitted sea water to the hold, and that sea water came in contact with only a limited portion of the cargo in the hold, would that sea water damage in your opinion have a tendency to cause any other kind of damage, or any damage in a different part of the cargo? A. Yes, it might cause sweat damage; the sea water would start fermentation and this fermentation producing heat would heat the bags that came in contact with it. and if there was any amount of moisture there at all they would have fermentation in the bags; and I may also remark that fermentation cannot exist without the presence of water, or without moisture. 659

Q. Do you know whose system it was that you followed in testing these samples? Are there different systems or methods? A. There is the gravometric method, but in my opinion it is not any more accurate than, if as accurate as, the method I used; to sum it up my own is more practical, or at least, the method recommended by Fresenius is more practical, and that is the so-called volumetric. I may also add that the volumetric is just as good as the gravometric, and if 660

there is any difference it is in favor of the volumetric method; that has been the practical experience.

RE-CROSS EXAMINATION by Mr. Kirlin:

Q. If fresh water got into the hold it could set up fermentation just the same as salt water could?

662 A. Yes.

Q. And while fermentation cannot exist without moisture is it not a fact that the grain itself contains sufficient moisture to cause fermentation, if it isn't thoroughly dried? A. Yes, it does; but you have to have a certain amount of heat there; but if it is put in a place and just kept at the temperature—

Q. If it is put in a warm place? A. Yes, certainly.

366 Q. It is a common thing for corn to ferment? A. Yes; you have to have a certain amount of heat; fermentation is more favorable in certain temperatures.

Q. Have you ever examined samples of grain that has been fermented in elevators? A. No, I have not.

Q. You know, from your general knowledge, that that is not an uncommon thing? A. Oh yes.

Q. And elevators are pretty poor places, aren't

664 they? A. They are supposed to be.

Q. Heat comes from the confinement of the grain, doesn't it, in such cases? A. You know there would be no rise in temperature provided there is no outside influence, or providing fermentation has not set in.

Q. Green grain will always ferment, if confined? A. Yes, provided you get the necessary heat to do it; when I say "necessary heat" that is a term.

UNITED STATES DISTRICT COURT, 665

EASTERN DISTRICT OF NEW YORK.

GUSTAVE JAHN and W. J. GRIFFITHS, composing the firm of GUSTAVE JAHN & Co.

Libellants,

AGAINST 666

THE STEAMSHIP "FOLMINA," her Engines, etc.

We, WALTONS, JOHNSON, BUBB & WHATTON of 101 Leadenhall St. in the City of London Solicitors the agents for the Proctors for the Libellants, and we HOLMAN, BIRDWOOD & COMPANY Solicitors to JOHN HOLMAN & SONS of 50 Lime Street in the 667 City of London the Agents for the Proctors for the Claimant in pursuance of his direction contained in the "Stipulation to take Testimony abroad" in this matter hereby certify as follows:

1. That it was agreed between ourselves that the Depositions of the witnesses should be taken before H. B. Langridge, Esq., Barrister-at-Law.
2. That the testimony should be taken in shorthand by a representative of the firm of 668 Messrs. Cherer Bennett & Davis shorthand writers.
3. That the reading over and signing of the deposition should be dispensed with.
4. That all formalities in connection with the taking of the said Depositions have been complied with.

Dated 2nd day of April, 1902.

WALTONS, JOHNSON, BUBB & WHATTON,
HOLMAN, BIRDWOOD & Co.

669 UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GUSTAVE JAHN and W. J. GRIFFITHS, composing the firm of GUSTAVE JAHN & Co.
Libellants,

670 AGAINST

THE STEAMSHIP "FOLMINA," her Engines, etc.

We, JOHN HOLMAN & SONS of 50 Lime Street in the City of London the Agents for the Proctors for the Claimants hereby admit that the samples in question in this matter received no damage from
671 the time they were handed in at St. Pancras Station by an employee of the Atlas Express Company to the time they were placed on board the S. S. *Etruria* at Liverpool for carriage to New York.

Dated, this 3rd day of April, 1902.

JOHN HOLMAN & SONS.

672

William Ryder. 673

Shipping Exchange,
Billister Street, E. C.
Monday 13th, January, 1902.

GUSTAVE A. JAHN and Another,

AGAINST

THE STEAMSHIP "FOLMINA." 674

EXAMINATION OF WITNESSES BEFORE,
A. B. LANGRIDGE ESQ.

It was agreed betwen the agents that the depositions of the witnesses should be taken before A. B. Langridge, Esq., Barrister-at-Law who thereupon administered the oath to the witnesses, having previously sworn the shorthandwriter truly and faithfully to take down and transcribe the notes. 675

It was agreed that the reading over and signing of the depositions should be dispensed with.

WILLIAM RYDER Sworn:

EXAMINED by Mr. Mathew:

Q. I think you are the head sampler at St. Andrew's Wharf? A. Yes. 676

Q. Is that a wharf of Messrs. Carbutt & Company? A. Yes.

Q. I think you have been in the rice business for a great number of years? A. Yes.

Q. 28 years? A. About 26 years.

Q. Your duty is to sample goods including rice when they arrive at this wharf? A. Yes.

Q. When rice is brought to the wharf how is it unloaded? A. By steam tackles.

677 William Ryder.

Q. Steam crane, is it? A. Yes, we call it a steam tackle.

Q. The tackle is let down into the lighter and the bags handed one by one from the lighter, and where are they deposited? A. On to whatever floor we are going to land it on.

Q. Do you remember last June on the 21st these 876 bags of rice coming to the wharf? A.
678 Yes.

Q. Was that in a lighter called the *Alderney* that they came? A. I could not tell you the name of the barge.

Q. Do you remember noticing the barge? A. Yes.

Q. Was it covered up? A. Covered up.

Q. How? A. With a tarpaulin.

Q. Did they begin to discharge the rice at once? A. As soon as they uncovered it.

679 Q. With the same tackle that you have described? A. Yes.

Q. Had you received certain instructions from the superintendent of the wharf as to sampling this rice? A. Yes.

Q. What were those instructions?

(Question objected to.)

Q. Did you receive particular instructions about this rice? A. Yes.

Q. Did you sample the rice? A. Yes.

680 Q. And did you do it carefully? A. Yes.

Q. How do you sample rice when it comes to the wharf? A. If it is a bad lot——

Q. What is the process, if you want to ascertain what sort of rice there is in a particular bag what do you do? A. Sample it extra.

Q. How do you look at the rice? A. By taking it out in our hand.

Q. This particular rice you divided up I believe into different qualities? A. Different lots.

Q. Did you divide them up into two piles? A. I think about six piles.

Q. Was there one pile that you divided into four different classes, the better rice? A. Yes, pile 1.

Q. Pile 1. A. One cross, two crosses and three crosses.

Q. What do they mean? A. One cross is not damages much, only just a little, and they go on 682
further, the second cross is damaged more and the third cross more.

Q. Pile 1, was that divided into separate classes? A. Yes.

Q. And did it consist of better class rice? A. Yes.

Q. Was there a second pile consisting of inferior rice? A. Yes.

Q. And was that divided into three? A. That was divided into three.

Q. One, two and three? A. Pile 2 one cross, 683
pile 2 two crosses, pile 2 three crosses.

Q. When I say inferior I mean more damaged? A. Yes, more damaged, discoloured we call it.

Q. The same quality more damaged? A. The same quality more damaged.

Q. In addition to piles one and two did you have a separate lot also consisting of re-packed bags? A. Yes.

Q. What is that? A. That means the bag is so rotten that they cannot put it in the barge, they 684
must put it into another bag and put the same bag into that other bag, and we call them repacked.

Q. In fact re-bagged? A. In fact re-bagged, the bag and all goes into the new bag.

Q. While you were doing the sampling was the superintendent of the wharf with you? A. Not all the time.

Q. Part of the time? A. Yes, a good part of the time.

Q. Was that Mr. Wright? A. Yes.

685 Q. When you had sampled a particular bag did you put any mark upon it? A. Yes, always, a chalk mark whatever it was, the pile and one or two crosses.

Q. You showed upon the bag the particular pile and the particular class to which it belonged? A. Yes.

Q. When a bag had been sampled what was
686 done with it? A. Stacked, took right away from the door and stacked.

Q. Where was it stacked? A. I could not tell what floor it was, as soon as I had done with the bag it was stacked.

Q. Under cover? A. Under cover, yes.

Q. While the lighter was being unloaded what sort of weather was it? A. Fine weather.

Q. After you sampled the goods in that way did you make up and average sample? A. Yes.

687 Q. How do you make up an average sample of rice? A. Taking a piece out of each bag according to the pile and making it up in that way.

Q. Just explain a little more in detail? A. So many bags of each pile, we judge the sample and take so much out of each bag to make up according to what they want, a 7 or 8lb. sample.

Q. You make the bags a proportionate size to show the quantity of any particular quality that there is? A. Yes.

688 Q. Do you make bags up in that way in proportionate sizes? A. Yes.

Q. To show the quantity of that particular quality of rice? A. About a 7 lb. bag I made up.

Q. And if a smaller quantity a smaller bag? A. Yes.

Q. Paper bags the little one the big ones canvas? A. Yes, when a small parcel we only show a small sample.

Q. A person who saw one of these samples would gather not only the quality but the quantity

689

of that particular sort of rice there was? A. Yes.

Q. When you got the samples made up what did you do with them? A. I showed them to Mr. Wright to see if he approved of them.

Q. Do you know what happened to them? A. I took them to the office and do not know what became of them. That is the Mill office, I do not mean the City office.

690

Q. You had no more to do with them after that? A. No, I had no more to do with them after that.

Cross-Examined by Mr. Southall:

Q. About these bags, what ship did they come in? A. I could not tell you.

Q. Do you know where they came from? A. I am no scholar, it is a long time ago, I could not keep it in my mind, I think we have all the particulars in the papers Mr. Wright has.

691

Q. You do not know where the rice came from? A. No.

Q. How many bags do you say came out? A. 700 and odd, Mr. Wright has all the full particulars in the papers.

Q. Did all the bags come in one lighter? A. All in one barge, yes.

Q. Where you told to keep this special lot of rice separate? A. Yes.

692

Q. How do you specify which pile any particular bag is to go into? A. If it is a bad bag we have four different piles we put them into according to the bag.

Q. How do you judge whether a bag is good, simply by the bag? A. Simply by the stuff.

Q. Do you open every bag? A. We have an iron to stick into every bag, we stab it once or twice, eight times if necessary.

Q. What do you do when you stab it? A. You can draw out the rice.

693 William Ryder.

Q. And look at the rice? A. And look at the rice.

Q. And judge by your own experience? A. Yes.

Q. You say you put pile 1, what does pile 1 mean? A. That means good order, only damaged.

Q. Do you ever divide it into more than four classes before you start a new pile? A. Yes, two crosses is worse, and three crosses is worse than
694 that and the four crosses is no good at all.

Q. You say pile 1 had good rice? A. Comparatively good rice, damaged.

Q. The four crosses heap of pile 1 that was useless was it? A. Yes, that was useless. I do not think we had any four, we do not get much good rice in the third class.

Q. What was in pile 2? A. That is discolored, heated.

Q. It is heated? A. Yes.

695 Q. That means it has been sweating? A. It gets hot and gets the color.

Q. What is pile 2? A. Pile 2 is very nearly red and pile 1 is a lighter color.

Q. Had pile 1 sweated too? A. No, only the damaged.

Q. The damaged you saw you thought was from sweat? A. Yes.

Q. When you got those samples into bags how did you close the bags? A. With the iron.

696 Q. I agree you get the samples out? A. It is merely an iron that goes into the bag and makes a hole and when you draw the samples out you can close the hole up.

Q. You take out certain sample bags, what do you do with those, how do you close them up? A. Tie them up with string.

Q. Do you seal them? A. I do not know what they do in the office, I do not, I only tie them up and take them to the office and put the paper in

them according to what they are, pile 1 one cross, or whatever they are.

Q. How did you distinguish this rice from any other? Did you take other samples that day or the next day, are you taking samples every day? A. Yes.

Q. How do you distinguish one sample from another sample? A. We put a paper in the top.

Q. What do you put on the paper? A. I have 698
nothing to do with that, the City boy has all that to do.

Q. He might put the wrong paper into the wrong sample? A. I should not think so.

Q. I want to find out what you do? A. I think you had better see the office boy about that, he does all the samples.

Q. I want to know what you do with it. How many bage of samples did you take from this lot? A. I might have taken seven. 699

Q. What did you do with them? A. Put a paper in.

Q. What did you put on the paper? A. Pile 1, pile 2, pile 2 cross.

Q. You do not put the date? A. I do not have anything to do with it.

Q. I want to know what you do? A. That is all I do.

Q. You do not put what lighter? A. That is done in the office, I do not do it, I am no scholar. 700

Q. You simply put pile 1 and the one, two, three or four crosses whichever it may be? A. Yes.

RE-EXAMINED by Mr. Mathew:

Q. You have been asked about making these different piles, you do not read or write yourself? A. I only put the mark as say, pile 1 one cross, I do not put the date or anything.

701 Benjamin Edwards Reina Newlands.

BENJAMIN EDWARD REINA NEWLANDS sworn:

EXAMINED by Mr. Mathew:

Q. You are a Fellow of the Chemical Society? A. Yes.

Q. And of the Institute of Chemistry? A. Yes, and Vice President of both.

Q. And also I believe a member of the Society
702 of Public Analysts? A. Yes.

Q. Have you had considerable experience in dealing with rice? A. Yes, a large experience in connection with damaged cargoes from salt and fresh water.

Q. Of all sorts? A. Yes, including rice.

Q. On the 2d of December last do you remember Mr. Molineux of the firm of Molineux and Walker coming to your office? A. Yes.

Q. Did he bring eight samples of rice in bags?
703 A. Yes.

Q. And did he ask you to analyse them? A. Yes.

Q. What was the object of the analysis to be? A. The cargo was supposed to be damaged and the question at issue was whether this sample contained salt water, whether they were damaged by salt or fresh water.

Q. Did you in obedience to those instructions make an analysis of the samples? A. Yes.

704 Q. Did you find any percentage of chloride of sodium in the rice? A. I found in all of them salt.

Q. Chloride of sodium is common salt? A. Yes.

Q. From what you saw in the samples can you say what in your opinion the cause of the damage was? A. I have no doubt it was due to salt water.

Q. Did you make a report on the subject of these samples? A. Yes.

Q. A report dated the 17th December in last year? A. Yes.

Q. Do you produce that report? A. Yes.

(It was put in and marked B. F. R. N. 1.) See p. 780.

Q. One or two questions about that report. There are certain figures on the left hand side, what do those figures represent? A. They represent the number of bags in each parcel.

Q. The first numbers. A. They relate to two piles, the first four and the next three. They represent the two piles, so I was informed. I do not know of my own knowledge.

Cross-Examined by Mr. Southall:

Q. I suppose you have known sweated cargoes? A. Yes, many.

Q. There is no common salt needed to produce that sort of result? A. Both fresh and salt water will produce mouldiness, the same effect.

Q. Do you know anything about the facts of this cargo? A. No, I do not know; I am merely the Analyst. On the Clyde I have had large experience with similar cargoes, and cargoes of rice where mould has occurred, and that has occurred both in salt and fresh water. The salt does not interfere or make any difference. Cheese contains about 2 per cent. of salt and is very often mouldy.

Q. You suggest that every one of these bags was absolutely touched with salt water? A. Yes, but not saturated.

Q. The suggestion that some of these were only damaged through sweat and being in close proximity to bags that were wet would not be sufficient for your purpose? A. I simply ground up an average sample.

Q. Did you grind up eight separate samples?

709 A. I ground up eight separate samples, I reserved a portion unground, but I ground up a portion.

Q. Would this salt be found if there had been sweating from bags being in close proximity to bags that were wet? A. Salt cannot be obtained by the evaporation of water unless it is salt to begin with, and, as rice does not contain salt within the third or fourth decimal point, it does not
710 come from that.

Q. Any suggestion that this was damaged by sweat by being close to bags that were wet would not account for it? A. It could not account for the salt. I can easily understand that if a portion of the cargo is damaged by water the other part might suffer from sweating afterwards.

Q. It would not produce the same result? A. No, it would not produce the salt.

Q. I suppose as a rule when a cargo has been
711 damaged it is worse at the bottom than at the top? A. No, not always, the water may get through the deck.

Q. This cargo was not in the 'tween-decks, it was in the hold below, and the cargo above this I think it is agreed was not damaged by salt water? A. The top portion was not.

Q. You would agree it naturally would be in a case of that sort that the bottom would be worst? A. The bottom would contain salt and the top
712 would have no salt.

Q. And if no damage at the bottom and the cargo half way up damaged you would hardly think that could be so? A. That might be due to the fact that the bottom being wet would sweat and heat by fermentation take place and a raising of the temperature and the top portion damaged by the moisture from the bottom.

Q. The top part would be damaged first? A. Unless the damage is inherent, which I do not think there is any reason for supposing.

Q. I do not agree with the analysis, of course. A. You might have mould due to inherent defects obviously. The rice might have been wet.

NICHOLAS GEORGE MOLINEUX Sworn:

EXAMINED by Mr. Mathew. 714

Q. You are a member of the firm of Molineux and Walker? A. Yes.

Q. Who carry on bussiness as Colonial Brokers at 9 Mincing Lane? A. Yes.

Q. You have been in the business for some 30 years? A. Yes.

Q. And you have been connected with the rice trade during all that time? A. The whole time.

Q. Mr. Frederick Walker is your partner? A. Yes. 715

Q. Do you remember the 11th of June last your firm receiving certain bills of lading for a cargo of rice? A. For a portion of the cargo, yes.

Q. Have you got the bills of lading? A. No, they have to be lodged.

Q. They were bills of lading for 876 bags of rice? A. Yes.

Q. Marked "G. A. J. & Co." A. Yes.

Q. And the goods were coming from the *Minnehaha*? A. Yes. 716

Q. The rice was consigned to your firm for sale? A. No, it was consigned to a firm in Liverpool, Pferdmendes Preyer & Co.

Q. Did you pay the freight and the landing charges for the rice? A. Yes.

Q. To the Atlantic Transport Company? A. Yes.

Q. And did you then hand the bills of lading to Messrs. Carbutt & Co. your wharfingers? A. Yes.

Q. And did you instruct them to collect the rice? A. I instructed them to collect and land it.

Q. Did you give other instructions in regard to the sampling of the rice? A. Yes, special instructions.

Q. To whom did you give them? A. Carbutt & Co.

Q. What instructions did you give? A. Not only to sample it for damage, but to sample it for heating, which is unusual.

Q. Were those instructions in writing? A. Yes, they were.

Q. Would you look at this and tell me if any one of those contains your instructions? (Handing a bundle of documents to the witness.) A. "If necessary make piles of heated damage apart from the sea damage." It is written there on those.

Q. Written on your form? A. No, that is taken from what I wrote.

Q. Dated 12th of June? A. Yes.

Q. You gave the instructions to Messrs. Carbutt? A. Yes.

Q. Were those the instructions that you gave? A. Yes.

Q. This is Carbutts' note of your instructions? A. Yes.

Q. On the 26th, or about the 26th of June do you remember the samples being delivered at your firm's office? A. Yes.

Q. By the wharfingers? A. By the wharfingers' man.

Q. How were they brought do you remember? A. He brought them up to the office and put them on the counter in the ordinary way on the sample counter.

Q. Some of them being in paper bags and some in canvas bags? A. Two in paper bags, only one bag each, the others in canvas bags.

Q. Did the samples remain there on the counter? A. They remained on the counter until the rice was sold.

Q. Samples do remain on the counter for the inspection of buyers? A. No, they are packed away in the office, they cannot remain on the counter because the counter is constantly being used, the black desk.

Q. Who bought the rice? A. Mr. Gillespie. 722

Q. Did he inspect the samples? A. He inspected the samples with me, we opened the samples together.

Q. And he thereupon bought the rice? A. No, not thereupon, it was some days later.

Q. Subsequent to the inspection he bought the rice? A. Yes.

Q. The sale was by sample? A. Yes.

Q. Do you recollect what price he gave for the rice? May I remind you, £617 1s 8d. A. I have 723 signed my account sales, I really cannot remember the amount. (After referring) £617 gross, yes.

Q. And Mr. Gillespie the buyer took delivery of the rice from the wharf? A. No, they were in his wharf.

Q. Mr. Gillespie is the same as Carbutts' A. Yes, he is one of the directors.

Q. What did you do with the samples after the sale of the rice? A. The samples were tied up with string and put on one side in a box. 724

Q. In a sample room? A. In a sample room.

Q. What sort of a room was that? An ordinary room like this.

Q. A dry room? A. A room like this.

Q. Properly aired? A. Properly, exactly like this, it is this, it is where the clerks are and where we are. The side towards the window has a black board to put them on.

Q. Is it necessary in your business to keep

725 samples properly and carefully? A. Yes, it must be.

Q. Do they remain labelled, the samples? A. The bags are stencilled, the canvas bags are stencilled as to what the contents are.

Q. Have you recently had occasion to inspect some of these samples, have you looked at them since the sale of the rice? A. Since the sale of
726 the rice I inspected them.

Q. In what condition were they? A. Perfectly good; I sent duplicates to America, portion of those samples I sent to America.

Q. Was that by request? A. Yes.

Q. Of whom? A. Richard Goff & Co.

Q. When you packed those samples up to send to America how did you pack them up? A. I bought new canvas bags myself; I opened the samples out on that desk and filled in a proportion
727 of each into these sample bags, taking them carefully as a man of experience would do, not to put too much damaged or too much sound or heated.

Q. The bags themselves you packed into a box? A. Yes, I put them into a box myself.

Q. Did you hand the box to the Atlas Express Company? A. The Atlas Express man took it from me.

Q. Was it on the 17th of July last or about then? A. On the Thursday.

Q. I think you yourself handed the box to the
728 representative of the Atlas Company. A. I gave it to the collector myself.

Cross-Examined by Mr. Southall:

Q. You say these samples were handed to you on the 26th of June, how were they marked—how many first? A. I think 10. Eight samples only were sent abroad, I think there were 10.

Q. All out of this one parcel? A. All out of

this one parcel. I can tell you positively (after referring) 10.

Q. Why did you only send eight abroad? A. Because two of them were only one bag of sweepings, one bag each, in fact one bag was a wrong mark, it was somebody else's rice.

Q. How were these samples brought to you, how were they marked? A. By stencil.

Q. When you received them they had been sten- 730
cilled on the canvas bag? A. Yes.

Q. What was on them? A. "G. A. J. & Co." taking the top mark "C. S. D." which is first class sea damaged, "Ex *Minnehaha* from New York, St. Andrew's Wharf."

Q. That is all stencilled on the bags? A. That is all stencilled on the bags.

Q. Is it the custom to keep samples after you have sold the bulk? A. We keep them for a time.

Q. How long is the usual time? A. As a rule 731
I should keep them till the payments had been made, or perhaps afterwards.

Q. Have these goods been paid for? A. No, they have not; they get a prompt in four weeks, we might make it five; we should keep it until the money had been paid. As the money had to go to America I should wait till the confirmation came.

Q. You did not keep these for any special reason? A. We received a cable or a letter in con- 732
firmation of a cable, asking us to send damaged bags, empty ones to America; I thought there might be some difficulty and those were put on one side and not destroyed, the samples.

Q. These samples were kept separately? A. In consequence of being asked for damaged bags, empty one.

Q. Is it usual to export damaged rice from America? A. Damaged rice is never kept there, they cannot afford to pay the duty, the duty is more than the value of the rice, it is something like 80 per cent.

JOHN KEEFE sworn:

EXAMINED by Mr. Mathew:

733 Q. I think you are one of Messrs Carbutt & Co's sample men? A. Yes.

Q. Do you remember some bags of rice coming to Messrs Carbutt's Wharf last June, bags out of the "*Minnehaha*"? A. Yes, I have an idea.

734 Q. Do you remember Mr. Ryder telling you to bags? A. I do not exactly remember him sampling the bags.

Q. Do you remember Mr. Ryder telling you to take some sample bags from the wharf to Mincing Lane? A. I had instructions from Mr. Wright to do that.

Q. To take the sample bags to the City office from the wharf? A. Yes.

Q. How did you take them? A. On a truck.

735 Q. How long did it take to do it? A. About 20 minutes.

Q. I think you carried the bags when you got there to Messrs. Molineux & Walker's office. When you got to the City office where were you told to take them to? A. Messrs. Molineux & Walker.

Q. When you got there what did you do? A. Simply took them upstairs and put them on the board.

Q. Do you know what sort of a day it was when 736 you took these samples? A. A fine day.

Q. Dry? A. Yes.

CROSS-EXAMINED by Mr. Southall:

Q. Do you remember this special parcel coming? A. I do not remember.

Q. I suppose you take samples constantly up to the City office. A. Every day.

Q. You do not remember these samples particularly at all? A. I cannot.

Adjourned *sine die*.

NICHOLAS GEORGE MOLINEUX re-called.

FURTHER EXAMINED by Mr. Mathew:

737 Q. Let Keefe stand up. (Keefe stood up) Can you say whether this man Keefe was the man who brought the samples to your office? A. I am almost perfectly certain of it, I see him very often and I know him well.

738 Q. To the best of your recollection it is the man? A. Yes.

Q. When the samples were brought to your office by him were they then marked with the pile that they belonged to and had they also upon them a cross or crosses to show their quality? A. No, they were properly stencilled. I have the originals here (Bags produced.) The last time I said there was "C. S. D." on them, and I said that by reason of the receipt that was given.

739 Q. Describe what there is stencilled on the bags? A. Here are six bags, "Japan rice Pile 2 sea damaged cross 3". and each bag has the words "Sea damaged" on it.

Q. They are all stencilled in the same fashion? A. Yes, the words "Sea damaged" actually put on it.

Q. I think you were asked before if you had given instructions to Carbutt about the sampling of this rice. Can you say exactly what your in- 740 structions were from looking at your books? A. I wrote a letter which I found afterwards dated the 12th of June, Messrs. Carbutt & Company Limited. G. A. J. & Co. 876 bags damaged rice per *Minnehaha*. We are instructed to have the above sorted out selected and weighed. As we know the steamer to be damaged it would be desirable to have it done as landed. As arranged with your Mr. Carbutt the condition of landing will depend on what is to be done with it, but if

the samples we have in anyway represent the bulk the rice is only heated. Those samples as it happens had nothing in the world to do with this rice at all, it was a future contract. They were samples of contracts for some 1700 tons I sold afterwards.

Q. The instructions you were giving were with reference to what? A. 876 bags of damaged rice.

742 Q. And those instructions were in regard to the rice the subject matter of this action? A. Yes, I say on that day when I received instructions from Liverpool I wrote *Folmina* on a piece of paper and I looked into the Lloyds list and I found there that the *Folmina* had her "rudder and post stern broken, stern frame and rudder broken in three places, twelve plates were buckled, one cracked, getting tenders on specification." That is written on the back of an envelope and

743 curiously enough it is dated the same day.

Q. All I wanted to know was if the instructions were about this rice? A. Yes, the instructions were about this rice positively. What I meant to say was this, that I was asked whether I had given the instruction in writing or what I had done. I was asked whether I had a doubt as to whether the rice was damaged and the reason. I say the reason is this I have this piece of paper which I pinned to the letter of Pferdmen-

744 ges Preyer & Co. Those are the people who gave me the rice to sell. (N. G. M. I.)

Further Cross-Examined by Mr. Southal:

Q. You got the instructions about this rice. You were not acting for the receivers of this rice? A. Not at all.

Q. Not till it was landed were you concerned with it. Why do they instruct you as early as

the 12th of June? A. The letter is there on the *11th.*

Q. What time did the cargo or the samples of the cargo arrive? A. I received the bill of lading on the 12th.

Q. When did the samples come to you. Were the samples sent to you before the cargo, by another steamer? A. No, the samples were sent when the cargo was landed at the wharf.

Q. You talk in your letter about samples on the 12th? A. That had nothing to do with this at all, it was rice that I sold afterwards.

Q. How was it you mixed these two cargoes up? A. Simply the samples came and it was similar rice. One was sound. I had got the samples in the office.

Q. Where did the samples come from, those you refer to? A. From New York.

Q. They were sent not with the cargo but separately? A. Which cargo?

Q. The cargo of rice itself? A. I sold that cargo on those samples, I think 1,700 tons, afterwards.

Q. But the cargo came here, did it? A. Yes.

Q. Did you get the samples after the cargo arrived or before? A. Before what I sold upon those samples?

Q. Yes? A. I got them two months before.

Q. The cargo was here when you had those samples? A. This rice came first. I received two samples and being rough Japan rice I inferred that perhaps they had something to do with this, but afterwards I found this was the damaged portion—the samples mentioned on that slip of paper. There are the words Fomit & Follme.

Q. What I want you to understand is this. The *Minnehaha* did not arrive I presume till shortly before the 26th of June? A. Oh yes she did.

849 Q. Would it be possible if that rice had come out of the *Minnehaha* that you should have had the samples by the 12th? A. The samples I am speaking of were only little ones in paper bags.

Q. Did they come out of the cargo when it had arrived or were they sent from New York? A. I do not understand your question.

Q. I ask where you got those samples from that
750 you refer to in that letter? A. From New York.

Q. How? A. By post.

Q. For example how did you get these samples, by post? A. No, these came from St. Andrews Wharf.

Q. If the others came by post possibly these came by post? A. The others are simply postal samples about two ounces.

Q. You talked of them both as samples. How can I tell the size by the way you speak? I am
751 trying to find out. You had them before by post? A. Yes.

Q. When did you find out or how did you find out that they had nothing to do with this? A. Because they offered me the rice. The samples were not damaged, the postal ones, and when these came up they were all damaged and could not correspond.

Q. You refer to damage in yoru letter? A. No, heated.

752 Q. You do not call that damage? A. No, damaged and heated are two different things.

Q. I should say they were both damaged. A. I do not.

Q. You do not agree with Mr. Ryder who says that the samples he took showed that they had been heated? A. You see he has piled them in two piles.

Q. The damaged he said was heated. A. There is pile 1 and pile 2, pile 2 is the heated.

753

Q. Part of this cargo that came by the *Minnehaha* was heated and part damaged. A. It was all damaged and part was heated.

Q. The heated was all damaged by something else? A. All was damaged and part heated.

RE-EXAMINED by Mr. Mathew:

754

Q. You do not know of course how the heating was caused? A. I was not on board the steamer, but I can give you my opinion if it is any good.

Q. What is your opinion? A. I should say the excessive sea damage caused the heating, caused the cargo to sweat.

THOMAS JAMES ALGER, sworn:

755

EXAMINED by Mr. Mathew:

Q. I think you are Dock Superintendent of the Atlantic Transport Company? A. Yes.

Q. Do you remember the *Minnehaha* arriving in Tilbury Dock on the 10th of June last? A. Yes.

Q. Is it your custom when a vessel arrives in your dock to send someone down into the hold to inspect the condition of the cargo before you discharge? A. Not exactly that, we send a man down into each hold to remain there whilst it is being discharged to detect any damage.

756

Q. Does that man make notes on the condition of the goods? A. Yes, that is so.

Q. And did he do that in this case? A. Yes.

Q. The *Minnehaha* had on board 876 bags of rice we know which were consigned to Messrs. Molineux and Walker? A. Yes.

Q. Do you produce the bill of lading for those bags? A. Yes.

757 Thomas James Alger.

Q. Has *the bill of lading in* the margin "All more or less damaged, 150 bags torn and mended and patched, 20 bags slack?" A. Yes, and also the remark "Not accountable for contents or condition."

(Document marked T. J. A. 1.)

758 Q. Had you also received from your New York people a notation of damage sheet giving particulars of the goods which had been shipped and remarks as to their condition? A. Yes.

Q. Do you produce that also. A. Yes.

Q. The remarks about these bags were "All more or less damaged, 150 bags torn and repaired?" A. Torn and repaired.

Q. Did you compare the remarks that the man you had sent down into the hold had made with the remarks that appeared upon the notation
759 sheet and bill of lading? A. Yes.

Q. Did you find they agreed? A. Yes.

Q. That is to say the goods had suffered no other damage while they had been on the ship? A. That is so.

Q. The day after the ship arrived, that is to say on the 11th of June, were these bags taken from the ship and placed in warehouse? A. That is so.

Q. What distance was the warehouse from the quay side? A. I should estimate about 35 or 40
760 feet, three lines of railway metals, that is all.

Q. Were they under cover there? A. Yes, proper bonded locked Customs warehouses.

Q. Were they put near any damaged goods or near anything which could have caused them damage? A. No, we had no other damaged goods in the ship.

Q. And did they remain piled in the warehouse till Johnston & Co., the lightermen, took delivery of them on the 15th of June? A. Yes.

Q. Do you produce a receipt from Johnston &

Co., the lightermen, in respect of these bags of rice? A. Yes.

Q. I see on the receipt is this note "All more or less damaged, 150 bags torn, mended and patched, 20 bags slack." A. That is in accordance with the bill of lading. The clerk in the hold reported the condition to me and I compared it with the notation sheet. Being satisfied that the damage was before shipment we took no further 762
trouble with it.

Q. I asked just now whether these bags were stacked in the warehouse and I asked whether they were stacked near any damaged goods. I understood you to say there were no damaged goods in the warehouse? A. That is so, the shed was confined to that ship's cargo and that was the only damaged cargo we had discharged.

Q. Was it a fine day when the rice was discharged or was the weather wet? A. I could not 763
tell from memory, I could give you the information if you wished. I presume it would be fine because we cannot use the winch in wet weather.

Q. You could not discharge if it was wet? A. No.

Q. Do you recollect how long it took to load the rice into the barge about? A. Yes, it started at 10:30 a. m. on the morning of the 15th of June.

Q. I mean from the ship into the barge? A. From the shed to the barge, from the warehouse 764
to the barge. I have not got the date and time it was finished, but it started at 10:30 a. m. on the 15th of June and the report is signed on the 17th of June. *That* is the record of delivery, the tally, if you wish to see it.

Cross-Examined by Mr. Southall:

Q. This is the note made by the man in the hold? A. Yes.

Q. I see that he says that the bags were rotten;

practically the whole bags does he mean by that? A. He means to say that the contents were so damaged that they had rotted the bags, which I believe was the case as described to me.

Q. Does it mean all the bags—would he trouble to count? A. He would not trouble to count.

Q. Does he know anything about the bill of lading? A. He has to report to me anything he finds
766 in the hold, he comes to me and reports bags damaged in the hold.

Q. I do not want to know what he tells you, that is not evidence. If he has written anything that may be evidence. A. He need not write anything at all.

Q. As a matter of fact he did write? A. Yes.

Q. He says the bags are rotten. Does that imply that all the bags were rotten? A. Certainly.

Q. All you know is that the bags were taken
767 from the ship and put in the warehouse. Were you present when they were put in the warehouse? A. I might have been present but I did not take notice of the cargo.

Q. It is nothing to do with you? A. It is provided it affects my own ship. The man reports to me damage. If we had no notation of it being shipped in that condition it would be my business to find out what was the matter.

Q. I want to know if you superintended the load-
768 ing of the cargo from the warehouse? A. I superintend, but not any individual parcel.

Q. You did not see it put into the lighters? A. No, I did not.

Q. You any know the time by some note you have of something else? A. By the document which I produce.

Q. Do you say that they never discharge on a wet day? A. We cannot discharge on a wet day.

Q. Work ceases entirely and the ship would be kept if it rained for a week? A. We have to stop.

If it rained for a week we have proper tarpaulins put over the hatches.

Q. Did you use any tarpaulins on this occasion? A. No, we did not.

(The following is a copy of the receipt produced by the witness.)

"5832

Received in good order and condition 770
from the S. S. *Minnehaha*, Captain Robinson. from New York in R. Johnston & Co's lighter *Alderney* No. 409 to be landed at (blank)

Marks	Numbers	Description
G. A. J & Co.	876	876 bags rice

All more or less damaged 150 bags torn mended and patched 20 bags slack.

C. Terry, Lighterman.

Tilbury Dock,
17th June 1891." 771

(The following is the entry on the notation of damage sheet)

"G. A. J & Co. 876 bags of rice 150 torn and repaired 20 bags slack all more or less damaged."

772

Walter Cormack Sworn:

Examined by Mr. Mathew:

Q. Are you a foreman to Messrs. Robert Johnston & Co? A. Yes.

Q. Are they carriers? A. Yes.

Q. And lightermen? A. Yes.

Q. Do you remember the steamship *Minnehaha* arriving in Tilbury Dock about the middle of June, 1900? A. Yes, I do.

773 Walter Cormack.

Q. Were you instructed by your owners to take a barge there to load 876 bags of rice for carriage to Dock Head Mills? A. Yes.

Q. That is the wharf belonging to Messrs. Carbutt & Co.? A. Yes.

Q. And did you take the barge *Alderney* to Tilbury Dock to load the rice? A. Yes.

Q. Did you personally take delivery of the 876
774 bags on your barge? A. Yes.

Q. Do you remember what sort of a day it was? A. A fine day.

Q. How long did it take you to do the loading? A. About two hours and a half.

Q. When you had done loading the rice into your barge did you put tapaulins on? A. No, I put hatches first then tarpaulins over the top.

Q. Hatches first and then tarpaulins? A. Yes.

Q. You gave a receipt to the Atlantic Transport
775 Company which has been read "All more or less damaged 180 bags torn and mended and patched 20 bags slack." A. I cannot remmber that very well, I did not keep a memorandum of it.

Q. You did give a receipt to Mr. Alger? A. The receipt is the same as what the bill of lading is signed for.

Q. It contained the same clause as the bill of lading? A. Yes.

Q. While the bags were in your charge did they
776 receive any damage? A. No.

Q. Either by rain or sea water? A. No.

Q. Was the barge tight? A. Yes, an iron barge she was.

Q. And were you careful with the bags? A. Yes.

Q. Did you notice the rice in the bags at all, did you notice how it felt? A. Yes, it was hard.

Q. What is hardness in rice a sympton of? A. Damage from sea water.

Q. Have you had some experience of rice cargoes A. No experience of it.

Q. Have you handled rice cargoes often? A. I have had a few thousand.

Q. Do you say that lumpiness is ever caused by fresh water? A. If it were in the ship long enough.

Q. Speaking as an expert do you say that lumpiness is caused by sea water or fresh water? A. It will if it lies in the ship long enough. 778

Q. What? A. Make the bag lumpy.—the rice.

Q. Sea water will? A. Yes.

Q. You say that lumpiness is caused by sea water? A. Sea water or any water will do it.

Cross-Examined by Mr. Southall:

Q. How long had you these bags in the lighter altogether. You said it took two and a half hours to load? A. In my opinion about two or three 779 days.

Q. Were you on the lighter the whole time? A. Yes, had the lighter underneath me, my own barge.

Q. How far is the wharf away, how long does the journey take? A. Sometimes four hours, sometimes three days.

Q. Were you lying against the wharf most of the time or were you on the voyage? A. On the voyage coming home I should reckon.

Q. Two days? A. Yes.

Q. What made you so long? A. Fog. 780

Q. It was foggy? A. It was foggy at the night time.

Q. Two days fog? A. Sometimes it takes five days to get up from there.

Q. In June? A. Yes. Take the weather this week.

Q. This is not June. A. We had fog in June at the time I loaded that barge.

Q. That is what made you so long, that is why

781 the cargo was in the barge so long. A. Yes, but it would not damage.

Q. You did not count the number of bags that were rotten or damaged did you? A. Certainly not.

Q. You simply copied it out of the bill of lading; someone told you what was in the bill of lading? A. I saw the bill of lading.

782 Q. You copied it out? A. I did not because I cannot write.

Q. I thought you said you signed a receipt? A. I can write my own name. I signed a receipt.

Q. Someone else filled this receipt in, who did that? You said the receipt had these same words as the bill of lading. Who put those in? A. The clerk from the office down there.

Q. Did he count the bags in your presence? A. No.

783 Q. He simply copied out of the bill of lading? A. That is all. That is all we go by.

Q. Your receipt does not prove any more than the bill of lading proves. The bags were not examined, but simply because the bill of lading had it you put it in your receipt? A. That is all.

Q. What experience have you had with rice cargoes, simply taking them in lighters? A. Yes.

Q. And you are told sometimes they are damaged? A. I can see that for myself.

784 Q. What other sort of damage do you get? A. We can only see by the bags where they have been wet.

Q. You judge by the outside of the bag? A. We judge by the outside of the bag and feeling them.

Q. Sometimes they get heated do not they? A. I cannot answer about heating.

Q. You cannot tell the difference between heating and wetting. A. No.

JOHN REGINALD WRIGHT Sworn:

EXAMINED by Mr. Mathew:

Q. Are you in the employ of Messrs. Carbutt & Co? A. Yes.

Q. You are superintendent of St. Andrew's Wharf? A. Yes.

786

Q. That is one of their wharves? A. Yes.

Q. And that was the wharf at which the rice in question was landed and stored? A. Yes.

Q. I think you have been connected with the rice trade for some 18 years? A. Yes.

Q. And have had considerable experience in it? A. Yes.

Q. Were you present on the 21st of June last year when Ryder was doing the sampling? A. Not the whole time.

787

Q. But part of the time you were present? A. Yes.

Q. Supervising the sampling? A. Yes.

Q. I do not know that it is very clear from Ryder's evidence, so perhaps you will tell us how the sub-division of the qualities was done. There was pile 1 was there not and pile 2? A. Yes.

Q. Pile 1 was better class rice? A. Yes.

Q. Pile 2 was inferior rice? A. Yes.

Q. Pile 1 was subdivided into 1 cross, 2 cross. 788
3 cross and 4 cross rice? A. Yes.

Q. Pile 2 was subdivided into 1 cross, 2 cross and 3 cross rice? A. Yes.

Q. And then there was a pile of rebagged bags? A. Yes.

Q. Each of the bags as I understand was chalked with the number of its pile and with its own particular cross? A. Yes, each bag as it came out of the barge was manipulated and sampled so as to satisfy the sampler that he was piling

789 John Reginald Wright.

it correctly, and it would be marked one, two or three crosses as may be. We should merely do that for the guidance of the man on the floor below to take them to the right pile.

Q. The samples were also chalked with the number of the pile when they were made up? A. I would not say that, they would merely be put into bags which the sampler would use during the op-
790 eration. I can explain by showing you simply. A bag of this sort might be used turned out in *this* way with such a slip of paper as this made out by Ryder himself or by someone for Ryder, just to indicate for him to throw the samples he draws from the bag into that particular pile.

Q. That is to say he would have an empty bag and a slip upon it showing the pile and the cross? A. Yes, so that he could put that particular sample in its right bag.

791 Q. And the rice belonging to that class of pile and that class of cross would be put into that bag? A. Yes.

Q. There would be seven of those bags? A. Eight altogether.

Q. When the samples had been prepared were the samples and the bags compared together to see whether the samples had been rightly made? A. I do not follow the question.

Q. You would have the rice itself in particular
792 piles and marked with particular crosses? A. Yes.

Q. Would you then take your samples and compare them with the rice in bulk? A. No.

Q. I did not understand that from Ryder. A. No, we have the small samples that are taken in the course of the operation, they are brought immediately the operation is finished to the office, I examine them myself with the sample and find if they represent the whole parcel, if not we draw

793

more damaged or more good from that particular pile to which that particular sample may refer to make it represent that particular pile.

Q. You would look at the paper on the top and then examine the sample to see if it corresponded with the description on the paper? A. Not always the paper because my experience has given me such knowledge that I can see from the sample what it really represents.

794

Q. Then the samples as I understand were put in the Mill Office to be afterwards taken to the City office? A. Quite so.

Q. You observed that the rice was damaged yourself, did not you? A. Yes, when the barge was first alongside.

Q. You told us that you had considerable experience with rice. Did you form an opinion as to how the damage had been caused? A. *Yes, I certainly considered that the damage had occurred from contact with sea water,* and of course the experience we had afterwards in dealing with the individual bags also led me to confirm what I had previously thought.

795

Q. When the bags had been put in the Mill office and marked as you have described to us did you show them to Keefe, the man who has given evidence? A. Yes, and instructed him to take them to the City office. I afterwards learned that he did so and was instructed to take them to Messrs. Molineux and Walker's office.

796

Q. Just this general question, were those samples fairly taken? A. Yes.

Q. And do you think that they accurately represent the various classes and parcels of rice? A. Yes, I do emphatically think so.

Q. It has been suggested that the damage to this rice was caused by sweating. What do you say about that from what you saw? A. I should certainly say the first damage was caused by sea

797 water, but that the rice through the damage might sweat somewhat and so cause the discoloration in the damage.

Q. While you were taking these samples where was this rice placed? A. The bulk of the rice or the samples?

Q. The bulk? A. In St. Andrew's Wharf.

Q. Under cover? A. Yes.

798 Q. Was it fine weather when the samples were being taken? A. Yes.

Q. So that it could not have been damaged while the samples were being taken? A. No.

Q. Was there any delay in unloading it from the barge on to your Wharf? A. None whatever.

Q. The unloading began at once? A. Yes.

Q. In his evidence Ryder said that he thought that an office boy had something to do with the marking of the bags; is that so, does an office boy

799 have that duty upon him? A. No, I should have a man who helped me regularly to manipulate the samples and mark those bags.

Q. It would be somebody who would know what he was doing? A. Yes, besides I should attend to that. I make it my particular business to examine the bags.

Q. To see that they are fairly represented by the title that is put on them? A. Yes, most distinctly, quite independent of the marking of the

800 bags, and I see them put into those bags too.

Cross-Examined by Mr. Southall:

Q. When the samples are brought into the Mill office what marking do you say they have on them? A. I cannot say in this case that they had any particular marks on the bags.

Q. Or any paper or anything? A. They would probably have slips inside, the larger samples.

Q. Who marked those papers? A. Ryder might

do it, or he might get a man who was working with him.

Q. Ryder cannot write? A. He can make a sufficient mark to show that.

Q. He said they had no mark on them to distinguish them when he took them into the office. A. I do not say any mark on the bag.

Q. Do you remember this cargo specially or are you going by your routine? A. I can recall the 802
whole of the operation from the landing papers that I have.

Q. You could not recall whether there was a mark on the bag or not? A. Quite so. But quite independently the contents of the sample itself in these bags would indicate what pile it belonged to.

Q. It is quite left to your experience? A. Yes.

Q. You talked about the damage. Can you tell the difference between a thing that sweats and then gets sea water and a thing that gets sea water 803
first and then damaged? A. What is the distinction? A. The contact with sea water would cause the rice to become lumpy on the surface of the bag.

Q. Then it sweats and then what happens? A. It becomes lumpy.

Q. Any water makes it lumpy I understand? A. Yes, if it remains long enough, of course.

Q. Suppose it first sweats and then becomes wet what happens? I want to know how you tell. A. I am under the impression there would be a differ- 804
ent mark on the bag altogether, it would not be lumpy I think, it might be but not necessarily so.

Q. You were told this had been wet with sea water? A. Not at all, I simply had the particulars similar to what I have heard mentioned about the bill of lading and I then had to report accordingly after the operation of landing had taken place.

Q. You cannot tell the difference between a thing that sweats first and then gets wet and a

805 thing that gets wet first and sweats after? A. Yes, with Japan rice certainly.

Q. What is the distinction? A. It is very difficult to describe really; there is a difference, the damage is it gets lumpy and hard.

Q. In which case? A. The sea damage.

Q. You are not answering my question. A. It it slightly mouldy and green.

806 Q. What happens when it sweats? A. It does not intensify itself quite so much, the damage is not so clearly defined.

Q. It is the same damage only not so clearly defined. A. No. It has a different appearance. It is rather difficult to explain. It is more mildewy sort of damage.

Q. Which? A. The fresh water damage, or the sweating as you call it, which the other has not so pronounced.

807 Q. You said you could tell by the look it had been damaged by sea water first and then sweated afterwards. A. I did not say it had sweated. I merely say that it would go to cause the discoloration in pile 2.

Q. It was quite obvious to you that it had sweated?- A. I should assume only slightly. I should certainly add to that that I consider it due to the damage, that the damage had caused that sweating.

808 Q. That is what I wanted to get from you, whether the sweating was the first or the second? A. Yes.

Q. What is the distinction from the other. It must happen sometimes that rice sweats and then gets damaged by sea water? A. It does not occur to such a large extent.

Q. But I want to know the distinction. What makes the difference between this cargo and one that sweated first? A. I certainly do not think that the damage would be so pronounced.

Q. In what way? A. It would not be so much.

Q. It all depends how wet it got and how much it sweated. Taking your example of the handful of rice what is the difference between the handfuls in appearance? A. Of what?

Q. In the one case where it sweated and then got wet, and the case where it got wet and then sweated? A. Only by the appearance. There is a point evidently I do not quite grasp. 810

Q. How am I to tell, you say that is so yourself. You say I could tell the difference by the appearance, but I want you to tell me the difference. A. The sea damaged would be harder and would be green and partly red.

Q. In both cases there is sea damage, I admit that. You say the sweating followed from sea damage. A. I assume that it did, certainly.

Q. It might have happened the other way? A. I should certainly say not. 811

Q. Why? (After a pause.) If sea damage is done to rice it is usually done to the top bags or the bottom bags? A. Not necessarily.

Q. Unless there is a leakage half way up? A. Then the water would go to the bottom of course.

Q. The bottom rice must be damaged in the case of sea water unless it is just a little at the top and does not go very far? A. Not necessarily.

Q. If it is properly dunnaged at any rate. You would be astonished to find any damage done half 812 way up and not at the top or bottom A. No.

Q. Under what circumstances would it be damaged in the middle and not at the top or bottom?

A. If there was a leakage in the middle and it got into the middle hold——

Q. It is the cargo in one hold. A. I am afraid you are expecting me to answer something I have nothing to do with.

Q. I want to get the advantage of your experience. Here we have the cargo in one hold prop-

813 erly dunnaged not touching the side of the boat and the centre of the side is wet, it is not touching the side and is properly dunnaged and the bottom is not damp at all. Can you account for that? A. I should simply assume it had come in contact with some water either by leakage or a hole in the side of the vessel or something of that sort.

814 RE-EXAMINED by Mr. Mathew:

Q. The opinion that you formed as to the cause of the damage to this rice you formed at the time you were taking samples? A. No, as soon as we had the barge under I looked at the rice.

Q. You formed your opinion at the time; it is not an opinion you have formed since? A. Not at all.

815 Q. And you formed it from the appearance of the rice when it came in the barge and afterwards when sampling it. A.When landed at the wharf, quite so.

JOHN NEVIL, sworn:

EXAMINED by Mr Mathew:

816 Q. Are you a carrier employed by the Atlas Express Company? A. Yes.

Q. Do you remember on the 17th fetching a small wooden box from Messrs. Molineux and Walker's office in Mincing Lane? A. Yes.

Q. Did Mr. Molineux give you the box himself? A. Yes.

Q. What did you do with the box? A. I had it outside in Mincing Lane waiting for my van to come along with some more parcels.

Q. Did you put it in the van? A. Yes, I put it in the van.

Q. What sort of a van was it? A. A covered van.

Q. Did you take it straight to the Company's office? A. Yes.

Q. Is that in Whitecross Street? A. Yes, Whitecross Street.

Q. Did you notice whether the box was a new 818
one or an old one? A. It was almost a new one I think by the look of it.

Q. Was it fastened up properly? A. It was in sound, good condition or else I would not have received it.

Q. Did it rain at all while the box was in your keeping? A. No, it was a dry fine day.

Q. Did you afterwards take the box to the head office? A. Yes.

Q. Do you remember who you handed it to 819
there? A. Yes.

Q. Was it to Mr. James Pettit? A. Yes.

Q. Do you know what time in the evening that was? A. About half past seven when I arrived back.

Q. At the office? A. Yes, at the office.

Cross-Examined by Mr. Southall:

Q. How many boxes of this kind did you col- 820
lect in July? A. Only this one I collected.

Q. In all July? A. From Mr. Molineux.

Q. How do you recollect this box; what boxes did you collect next day? A. No box at all.

Q. Not from any one? A. Not from any one.

Q. No box at all the next day? A. No.

Q. None the day before? A. No.

Q. Never collected a box before or after? A. No.

NICHOLAS GEORGE MOLINEUX, recalled:

FURTHER EXAMINED by Mr Mathew:

Q. Do you remember on the 17th of July John Nevil coming to your office? A. Yes, he took the box of samples from me.

(Mr. Southall admits that the box of samples enclosed in a bag was handed to the Midland Railway Company by the Atlas Express Company and that a document was signed on behalf of the Midland Railway Company stating that a bag had been received by them.)

(At present no admission is made that the samples received no further damage while in transit from London to Liverpool to be placed on the *Etruria*.)

I certify the foregoing to be a true and accurate transcript made from my shorthand notes.

E. R. PEARCE,
Assistant to Bennett & Davis,
8 New Court,
Carey Street,
W. C.

I hereby certify that the evidence taken in this matter and contained in this and the forty-five preceding pages of this transcript was taken before me on the 13th day of January and the 7th day of March, 1902.

ARTHUR LANGRIDGE.

3 Temple Gardens, E. C.

of taking the Depositions set out 825
The expenses above are as follows:

Mr. A. B. Langridge's fee.....	7.70	
Jan. 13th, 1902, Messrs. Cherer, Bennett & Davis (shorthand-writers) Taking notes	1.10	
Transcript 62 copies...	2.14	
Duplicate	1.08	
Mar. 7th, 1902 Taking Notes	1.10	
Transcript 92 folios....	3.14	826
Jan. 3rd, 1902, Hire of room.....	1.10	
Mar. 7th, 1902, Hire of room.....	1.10	
	17.12.4	

WALTONS, JOHNSON, BUBB & WHATTON,
HOLMAN, BIRDWOOD & Co.

JAHN v. S. S. *Folmina*, &c.
This is the duplicate original report of the witness B. E. R. Newlands.
B. E. R. N. 1 827
ARTHUR B. LANGRIDGE.

London, 17th Decr. 1901
MESSRS. WALTONS, JOHNSON, BUBB & WHATTON.
101, Leadenhall Street, E. C.

Rice per *Folmina*.

Dear Sirs:—

I have examined eight samples of Rice, representing eight parcels, making a total of 875 828
Bags, marked *C. S. D.* ex *Minnehaha* which were handed to us by Mr. N. G. Molineux of the firm of Messrs. Molineux & Walker of 9, Mincing Lane on the 2nd of December, with the following result:

No. of bags in Parcel.	Per cent. Chloride of Sodium (Common Salt.)
48	.028
524	.032
166	.054
8	.053
5	.026
56	.026
6	.032
62	.144

829 From the amount of common salt contained in these samples and its varying quantity I have come to the conclusion that the whole of them are damaged by sea-water.

Yours faithfully,

B. E. R. NEWLANDS.

Late Vice-President Institute of Chemistry and of Society of Chemical Industry; Fellow of Chemical Society; Member Society Public Analysts.

830

Liverpool, 11th June, 1901.

MESSRS. MOLINEUX & WALKER,
London.

Dear Sirs:—

We duly received your memo of 6th inst., and now beg to enclose Bill of Lading & Landing Cer-
831 tificate for

G. A. J. & Co. 876 Bags rough Japan rice 1/23 shipped per *Minnehaha* (s) to order to London.

Gough writes under date of 1st inst. requesting us to have the rice sorted out, and disposed of to the best advantage for their account.

The rice is more or less damaged & we are sending it to London as we presume or consider it the best market.

The rice is ex *Folmina* just arrived from Japan
832 direct, & was shipped by Popp & Co.

Gough says you wrote that Japan rice is scarce, & in demand, & they hope for good results.

Yours faithfully,

PFERDMENGES, PREYER & Co.

(Endorsement)

JAHN v. S. S. *Folmina* &c.

This is the letter N. G. M. 1 put in in the examination of Mr. N. G. Molineux, March 7, 1902.

ARTHUR B. LANGBRIDGE.

John Soerensen. 833

DISTRICT COURT OF THE UNITED STATES

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN and Another,

AGAINST 834

The Steamship "FOLMINA" her engines etc.

Depositions taken on behalf of the libellants, at the offices of Butler Notman Joline & Mynderse, No. 54 Wall Street New York, on the 10th day of June 1902, Pursuant to notice.

PRESENT: 835

MESSRS. BUTLER, NOTMAN, JOLINE & MYNDERSE (Mr. Thacher) for the libellants;

MESSRS. CONVERS & KIRLIN (Mr. Kilbreth) for the claimant.

It is stipulated that the testimony be taken by a stenographer, signing, filing and certification being waived; stenographer's fee to be taxable.

JOHN SOERENSEN, being duly sworn and examined as a witness for the libellant, testifies: 836

By Mr. Thacher:

Q. What is your business? A. Lighterman.

Q. How were you employed in May, 1901? A. I was employed in the Manhattan Company.

Q. Of what barge were you captain? A. I was captain of the barge *Manhattan*, for five years.

Q. In May, 1901? A. I was employed in Stearns'.

837 Q. What barge were you captain of? A. The barge *Harry F.*

Q. Did your barge take any rice from the steamship *Folmina* in May, 1901? A. Yes, sir.

Q. When did you go to the steamer? A. I think it was the 15th of May I arrived there; about the 15th if I remember.

Q. Did you begin work that day? A. I begun
838 to work that day, yes, sir.

Q. Opposite what hatch did you lie? A. I worked in No. 3 hatch.

Q. Were you the first barge, or not, to take any cargo? A. I was the first barge that started on the rice.

Q. What time of day do you think you started to unload? A. I think it was right after dinner, or a little before noon, dinner, that I started.

Q. Did you go on board then at all? A. I
839 went no more than across the ship.

Q. Where was the rice that you took coming from? A. It was the first rice coming out; it came from the after part of the hatches, as far as I remember.

Q. Ont of No. 3? A. Out of No. 3.

Q. What condition was that rice in as it came in? A. The first part, a part of it was damaged; afterwards we got it better again.

Q. Did you stay right there until you loaded a
840 full cargo or did you move away at all? A. No, sir, I didn't move away from the ship; I just let another boat inside of me, me being the second boat.

Q. About how many bags had you taken before that? A. About a 1,000 bags.

Q. What boat was that? A. *The Kittie.*

Q. What was the name of her captain? A. Helmer Johnson.

Q. Did he load some bags? A. He loaded 500 bags.

Q. Then did he go away? A. Then he went away, and I came back again.

Q. And then you continued to take out more rice? A. Then I continued to take out more rice, yes, sir.

Q. What condition was that coming out in? A. Part of it good, and the further we got down in the ship the worse it got, the more damaged.

Q. The rice was more damaged the further 842
down you got? A. Yes, sir.

Q. About how many bags did you take altogether? A. I took between 3,500 and 3,600, if I remember right.

Q. How long have you been in the lightering business? A. For eleven years.

Q. Have you seen other cargoes of damaged rice? A. I have seen other cargoes of damaged rice, yes, sir; we see damaged bags to every cargo.

843

The rest of the answer is stricken out by agreement between counsel.

Q. In your experience in lightering and seeing damaged cargoes have you or not seen other cargoes of rice as badly damaged as this? A. No, sir, I have not.

Q. What did these bags look like? A. They were black and rotted out; some of the bags you couldn't touch at all. The rice was caked.

844

Q. In lumpe you mean? A. In lumps, the outside, and a couple of inches of it was like a cake; inside it might get soft again you know.

Q. Did any of these bags break at all? A. Yes, a good many of them that we couldn't move, we couldn't handle them.

Q. How did they take them out; in slings? A. In slings.

Q. How many in a sling? A. Six in a sling.

Q. Have you also seen cargoes of rice damaged by sweat? A. Yes, sir, I have.

845 Q. What difference, if any, is there, between sweat damage and sea water damage?

MR. KILBRETH: He has not testified that he has seen any damaged by sea water.

Q. Have you also seen rice damaged by sea water? A. Yes.

846 Q. (requested) What difference, if any, if there between sweat damage and sea water damage, as to the appearance of the rice? A. In sweat damage we can see every drop that has fallen down; it runs in drops; you can see the spots; it turns black in spots.

Q. How about sea water damage? A. That will generally cover the whole of the bag.

Q. The whole bag looks black do you mean? A. Not the whole bag, but on the side where the sea water comes against it.

847 Q. What was the color of this rice? Did you see it? A. Yes; black and green.

Q. In your opinion what was the cause of the damage to this rice, sea water or sweat?

Objected to.

A. We claim it was sea water damage; that was what we signed for.

Q. Did the bags and the rice have the appear-
848 ance of having been damaged by sea water? A. Yes, sir.

Q. Does sea water damage show darker or blacker, or not so dark as sweat? A. Yes, sir, it shows blacker than sweat.

Q. After you took on board this cargo of between 3,500 and 3,600 bags what did you do? A. Put my tarpaulins and covers over them.

Q. How many bags about did your lighter carry? A. Between 3,600 and 3,700.

Q. Is that a full cargo? A. Yes, sir.

Q. After covering up the rice, as you have described. where did you take it? A. We took it over to Union Stores.

Q. How was the weather? A. A fine day.

Q. While you were on the way to the Union Stores did any water get on that rice? A. No, sir.

Q. Any waves splash over the side? A. No, sir.

Q. Did you unload that rice the same day that you took it over? A. I commenced to work at one o'clock at the Union Stores, and partly unloaded it, and finished the next day.

Q. Was the rice discharged on the wharf? A. Yes, sir.

Q. Did you see what was done with it then? A. Got on horse trucks and put right in the stores.

Q. Did you actuallysee how your cargo of rice got in the storehouse? A. Yes, sir.

Q. Did you deliver that rice at the stores in the same condition that you received it in? A. I delivered it in the same condition that I received it in.

CROSS-EXAMINED by Mr. Kilbreth:

Q. What firm were you working for in May 1901? A. The E. Stearns Lighterage & Transporation Company.

Q. What is the size of this barge, *Harry F*? A. 123 registered tons.

Q. What is her length? A. 85 feet.

Q. Beam? A. 28.

Q. Square-ended? A. Yes, sir.

Q. How is she divided off; into what compartments? A. Only cabin and boatswain's locker besides the main hold.

Q. Was she decked over? A. Main deck; not a covered barge; not covered forward.

Q. She is not a covered barge? A. No, sir.

853 Q. How old is she? A. She was built in 1899; the 7th of the month I took charge of her.

Q. You took carge of her then? A. Yes, sir.

Q. Did you take carge of her at the builders' yards? A. Yes, when she was finished I took charge.

Q. Who built her? A. Mattison; 24th Street, South Brooklyn.

854 Q. You say that your barge was the first to take rice from the *Folmina?* A. Yes, sir.

Q. And that was a little before noon on May 15th? A. Yes.

Q. And you were lying opposite No. 3 hatch? Yes, sir.

Q. Did you go on board before you started to work? A. I was on board before I started to work, yes, sir.

Q. Did you look down No. 3 hatch? A. I look-
855 ed down No. 3 hatch.

Q. How much cargo was there in there then? A. The ship was only partly started to work then.

Q. Had any cargo been taken out of No. 3 hatch? A. Yes, sir.

Q. About how much? A. That is more than I can tell; I don't know what it was; dry goods and matting and stuff, and china stuff; that was No. 3.

Q. As you looked down No. 3 what did you see there? A. I saw the rice that I was going to take, in the after part of the hatch.

856 Q. Did you see anything else besides the rice? A. Yes, sir, other dry goods.

Q. What sort of dry goods? A. There was matting and there was skins and there was hides and all kinds of stuff.

Q. Boxes? A. Boxes; a kind of glue, whatever it is.

Q. Whereabouts were they stowed? A. They were right under the hatch.

Q. In the between decks? A. Yes, sir, in the forward hatch.

Q. Was there any rice in the between decks?

A. It was in the after part of the hatch, up and down.

Q. That was the rice that you started with? A. I don't know; or whether they broke down further.

Q. How long did you stay on board the *Folmina* at that time? A. I didn't stay any longer than my rice cargo stopped coming out, and when my rice cargo had come out I went on board of my boat.

858

Q. How long did you continue to load rice before you stopped? A. I loaded it three different days.

Q. From the *Folmina*? A. Yes, sir.

Q. How long did you continue to load after you got there, shortly before noon on May 15th, before you knocked off? A. I stopped that night.

Q. Didn't you tell us that you stopped for another lighter? A. Yes, sir, the next morning.

Q. Did you work steadily on the 15th of May from shortly before noon until you knocked off work for the night? A. Yes, sir, I did.

859

Q. How many bags did you take on in that time? A. Somewhere in the neighborhood of 1000.

Q. Did you go on the ship at all after this first time of which you have spoken, on that day? A. No, sir, not until right when we knocked off; I went over the ship.

Q. You went on board of the ship when they stopped working on the evening of May 15th? A. Yes, sir.

860

Q. And that was the second time you went on board her? A. Yes, sir.

Q. Did you look down No. 3 hatch? A. No, they were covered then.

Q. Did your lighter remain alongside the ship that night? A. Yes, sir.

Q. You went home, did you? A. I did.

Q. You don't know what happened on your lighter from the time you left her, do you? A. I do; I have got a mate.

861 Q. You weren't there, yourself? A. No, sir.

Q. When did you come back? A. Next morning before working time.

Q. Were the hatches open then? A. No.

Q. Did you go on the *Folmina* before the hatches were open on the 16th? A. I think I did.

Q. Did you look down No. 3 afterwards? A. Yes, sir.

862 Q. Before you started to work? A. Yes, sir.

Q. What did you see down there? A. They were putting out the dry goods again the first thing in the morning.

Q. Was there any rice left in the between decks? A. Yes.

Q. Had any been taken out? A. Yes, sir.

Q. How much of it was left? A. That is more than I can tell; I don't know how much was in the between decks. I can't look in under the decks.

863 Q. You have testified that you saw rice in the between decks the day before, and on the 16th? A. Yes, sir.

Q. Now I want to know how much of the rice that you saw on the 15th was left on the 16th? A. It was hard to tell by looking down through the square hatch.

Q. Was it half? A. It goes in on the deck; no, it couldn't be half; there wouldn't be much left in the between decks.

864 Q. Do you know if they had started to work the lower hold? A. I don't know.

Q. You looked down there? A. Yes, sir.

Q. Were the hatches off? A. In fact there was no solid between deck; it was only beams.

Q. How long did you work there on the 16th? A. I worked about five hours that day.

Q. And then the *Kittie* came along? A. Yes, sir.

Q. How long did she interrupt your loading? A. About an hour.

Q. Where did your lighter move to meanwhile? A. Alongside of her.

Q. Do you know what the object was in interrupting your loading and having the *Kittie* take on cargo? A. I do; 500 bags were supposed to go to the mills.

Q. Where was she going, in store? A. In store; 500 bags were duty paid and had to go to the mills.

Q. What time did the *Kittie* get through loading 866
on the 16th? A. She got through about half past eleven or a quarter to twelve.

Q. And then you resumed loading? A. And then we resumed loading.

Q. Did you load the remainder of that day? A. The remainder of that day till five o'clock at night, and didn't finish then.

Q. Did your lighter remain alongside all that night? A. Yes, sir.

Q. You went home? A. No, sir, I stayed on 867
board that night.

Q. You were on board the lighter? A. Yes, sir.

Q. You slept on board? A. Yes, sir.

Q. Did you resume loading on the 17th? A. I did.

Q. How many bags had you taken on on the 16th? A. Somewhere around 1700.

Q. How long did you load on the 17th? A. About two hours; a little over.

Q. And then you went to the stores? A. And 868
then we went to the stores.

Q. Did you go on board the *Folmina* any time on the 16th other than the time in the morning, of which you have already spoken? A. I might have crossed the ship's deck, and on the 17th also.

Q. Did you at any time go down into No. 3 hold? A. No, sir, I would have no business in the ship's hold.

Q. I understood you to say that when you first

began loading on the 15th the rice came out damaged; is that right? A. Yes; some of it.

Q. And then it gradually got better? A. And then it gradually got better again.

Q. How long did the damaged rice continue to come out at first; how many bags were damaged? A. Not very long at the start.

Q. How many? A. I can't quite remember how many I signed for the first day.

Q. You have testified that you took on board a thousand bags the first day? A. About a thousand, yes, sir.

Q. Tell me how many of those were damaged? A. I can't tell you; I can't say how many I signed for.

Q. I don't want an exact figure; I want your best approximation. A. The first day there wasn't many; say about 70 or 80.

Q. Did they come out first? A. Hardly first; right the main part in the start.

Q. How many of those in the start; sixty? A. Somewhere near that.

Q. And the others were scattered? A. You must know breaking down the ship four gangs are working in the ship—

Q. I don't care anything about that; I just want to know what you saw; do you say now that the worst of the damage was in the first few bags that came out? A. Yes, sir.

By Mr. Thacher:

Q. You are speaking of the first day? A. Yes.

By Mr. Kilbreth:

Q. On the second day; on the 16th, how did they begin to come out? A. They were very good in the start, and gradually they got worse.

Q. How many had you taken before they

started to get bad? A. About four or five hundred.

Q. And then how many were bad? A. Then you might get a draft with one bad or two bad, and then a couple of drafts there was none in again, and that was the way it went.

Q. Did that continue all through the day? A. Yes, sir.

Q. Getting a few damaged ones now and then 874
in a draft? A. Yes, sir.

Q. How about the last day? A. It got worse at the latter end, at the finishing part.

Q. Then the finish was really the worst of all, was it? A. Really the worst of all, yes, sir.

Q. Of those 3,500 or 3,600 bags how many do you think were damaged? A. I think there was over 300.

Q. Will you describe to me particularly how those were damaged; what appearance they gave? 875
A. Yes, sir; the bags were partly rotten; they were black and green looking, and the rice inside was caked; some bags there were so rotten that you couldn't take hold of them; you couldn't touch them.

Q. How did the sound bags look? A. The sound bags looked clean and good.

Q. What is the color of the covering? A. It is a kind of yellow.

Q. Brown burlap, isn't it? A. No, sir, it is 876
yellow burlap; good heavy bagging.

Q. And the damaged ones turned green or black? A. Yes.

Q. What did that indicate to you; moisture? A. That indicates to me that they had been damaged by salt water.

Q. Why do you say salt water? A. Sea water.

Q. Why do you say sea water; wouldn't any water make that same discoloration in the bag? A. It couldn't be anything else; fresh water

877 wouldn't make it that in the bottom; down in the ship.

Q. Then the only reason that you have for saying it is sea water is because you think they came from the bottom of the ship? A. The reason I could see—

Q. Just answer the question; any water will discolor a bag of this sort, will it not? A. It
878 will.

Q. You have distinguished the appearance produced by sea water and sweat damage by saying that sea water makes the whole bag or the whole side of a bag black or discolored; while sweat simply touches it in spots? A. Sweat stains it in spots like.

Q. Isn't the difference then simply one of degree? A. Well, when we can see if the whole side of the bag, or the side where the water
879 comes on that that is all discolored, we can't call that sweat, because we can't see any spots on it.

Q. Haven't you ever seen sweat damage where a whole bag was discolored on one side? A. No, sir.

Q. Sweat always, then, in your experience, has spots? A. Yes, sir, has spots.

Q. You have never seen any sweat damage on rice bags that was not spots? A. No, sir.

Q. Have you ever seen any sea water damage
880 that presented any other appearance than that which you have described as discoloring the whole side of a bag? A. I haven't seen any sea water damage different from what I have seen on this.

Q. What have you seen of sea water damage on cargoes of rice? A. I have seen the same thing like this, but fewer bags in other steamers.

Q. What steamers? A. That is more than I can remember; what steamers; I have been for the last five years in nearly every rice steamer that came to this port.

Q. Yet you can't tell the name of one steamer? A. No, sir.

Q. Can you tell me where you have seen any sweat damage? A. I have seen that around the hatch generally in every ship.

Q. Let me see if I understand you correctly; you distinguish sweating and sea water damage in this; that sea water damage will show blacker and more uniform than sweat? A. Yes, sir.

Q. And that is the only way that you can distinguish them? A. Yes, sir.

Q. How was the weather during the night of the 15th and 16th? A. Fair.

Q. What is the freeboard of your lighter when she is light? A. 9 feet.

Q. What was her freeboard when she was loaded? A. A foot and a half.

Q. How far is it to the Union Stores from where the *Folmina* was lying? A. May be it was about a mile.

Q. How were you transported there? A. By a towboat.

Q. What was her name? A. Either the *Charles Kuper* or the *Standard;* one of Kuper's towboats.

Q. Did she have any tow besides you? A. No.

Q. How long a hawser did you have out? A. Oh, about ten or twelve fathoms.

Q. How long did it take to get to the Union Stores? A. About twenty minutes.

Q. Was your cargo immediately discharged when you got there? A. Yes, sir.

Q. Did you take any receipts from the store people yourself? A. No, sir I did not.

Q. Anybody on board your boat take them? A. Yes, sir.

Q. Who? A. Not take them, no, sir, we didn't take any receipt; they wouldn't give us a bad receipt, so I didn't take any.

885 John Soerensen.

Q. How many men did you carry on your boat? A. Two men; captain and mate.

Q. Who was your mate at that time? A. A man by the name of Robert Krauser.

Q. Is he with you still? A. Yes, sir.

Q. Is he here this morning? A. No, sir, he is on board the boat this morning.

Q. Did you sign receipts for this rice as it
886 came on board your lighter from the *Folmina?* A. Yes, sir.

Q. You signed for that. you say, as sea water damage? A. Yes, sir; sea water damage.

Q. Is it often in rice ships that you have to sign for sea water damage? A. Not very often; sometimes we do; it all depends on how the ship's cargo is.

Q. Out of ten cargoes how many would have sea water damage? A. I suppose every ono has
887 got more or less.

Q. What would be the ordinary average amount in percentage of sea water damage in a cargo of rice? A. In some loads I might sign for about twenty.

Q. Do you mean that 20% of the rice would be sea water damage? A. No—out of my load—yes, sometimes I only sign for four or five out of my load.

Q. Out of a load of how many? A. Out of a
888 full load of my own; 3,600.

Q. Then the amount of what you claim to be sea water damage was considerably more than is usual? A. Yes, sir.

Q. Was it enough to excite your curiosity or interest to find out what had caused it? A. No, sir.

Q. You didn't go aboard the ship at all to try and find out what the matter was? A. No, sir.

Q. You didn't inquire what the cause of this large amount of damage was? A. No, sir.

889

Q. And you don't know? A. I don't know what accounts for it, no, sir.

Q. So that all you can testify to is simply the appearance of the bags? A. Of the bags that I received.

RE-DIRECT EXAMINATION by Mr. Thacher:

890

Q. Was your boat tight? A. Yes, sir.

Q. During those nights that you lay by the *Folmina*, before you had finished loading, was your cargo covered, or not? A. Yes, sir.

Q. On the first night was it covered, when you went ashore? A. Yes, sir.

Q. Was it covered when you came back in the morning? A. Yes, sir.

Q. Was the same true of the next night? A. Yes, sir.

891

Q. Did you notice any smell of this rice or these rice bags? A. A mouldy smell.

Q. When you were being towed up to the Union Stores did any waves or sea water come over your boat? A. No, sir.

Q. Did she leak? A. No, sir.

Q. Was she dry when you unloaded your cargo? A. Yes, sir.

RE-CROSS EXAMINATION by Mr. Kilbreth:

892

Q. What sort of covers are these? A. First we have cloths that we call side covers, reaching from the deck up over the middle of the boat; from each side like; and then we have two covers that go over the top again of that, and that gets set up like a tent; that is made of No. 1 Woodbury canvas.

Q. Have you any pumps on your boat? A. Yes, sir; one on each end.

Q. Did you take any soundings during these three days? A. Yes, sir.

893 Helmer Johnson.

Q. When? A. We took soundings once in a while during the daytime, and at night before we left the boats.

Q. What did you find? A. Didn't find anything more than an inch of water, in the boat, and I can't pump that out.

Q. Did you sound, yourself, personally? A. Yes, sir, when I am there I sound, and if the mate
894 it watching in the night time he sounds.

Npddi5wim wtoats(i uIt w-bavtci e..eo . s ss

Q. When did you sound on the 15th? A. I sounded at noon time, and I sounded before I went home.

Q. What did you find at noon? A. I found no water in the boat except that I can feel it wet; we can't pump less than two inches.

Q. Are these pumps hand pumps? A. Yes, sir.

Q. Do you keep a log, captain? A. No, sir.

895

By Mr. Thacher:

Q. Does your lighter have a board flooring? A. Yes, sir.

Q. Was that flooring dry when you discharged your cargo? A. Yes, sir, that flooring runs 14 inches above the bottom of the boat.

896

HELMER JOHNSON, being duly sworn and examined as a witness for the libellant, testifies

By Mr. Thacher:

Q. What is your business? A. Lighterage.

Q. What barge were you captain of in May, 1901? A. The *Kittie* sir.

Q. Did you take any rice from the steamship *Folmina* during May, 1901? A. Yes, sir.

Q. Do you know Captain Soerensen? A. Yes, sir, I know him.

Q. Do you know his barge, the *Harry F.*? A. Yes, sir.

Q. Was he at the *Folmina* also? A. Yes, sir, he was there ahead of me.

Q. Did you load at the same time he was loading? A. He had part of a load before I started.

Q. Did he make room for you, or did he still stay there? A. Well, I went inside of the *Harry F;* alongside the ship. 898

Q. Did you take some rice from the *Folmina*? A. Yes, sir.

Q. How many bags? A. 500.

Q. How long did it take you to load them? A. Well, about an hour.

Q. Where did you take them? A. I took them alongside of the steamer.

Q. Where did you take them to? A. To the Atlantic dock down to Johns' Mills.

Q. What is a full load for your barge? A. About 899 1,400 bags.

Q. When she is light what is her freeboard, about? A. Well, about seven feet.

Q. What was her freeboard when she had about 500 bags on board? A. About five feet, or five and a half feet.

Q. Is she a new or an old barge? A. She isn't new; she is about thirty years old, but she has been rebuilt.

Q. Was she tight the day you took this rice? 900 A. Yes.

Q. Had you sounded her bilges that day? A. Yes, sir.

Q. Any water in them? A. No, sir.

Q. Did you take this rice down to Jahn's Mills the same day that you loaded? A. Yes, sir.

Q. How was the weather? A. It was a fine day, the same as to-day.

Q. Did you cover the cargo, or not A. Yes, sir.

991 Q. What cover did you put on? A. Cloths, and then a top cloth over that again.

Q. Any canvas or tarpaulin? A. Canvas, yes, sir.

Q. How were you taken down there? A. We were towed by a hawser down to Jahns'.

Q. Were you the only barge, or was there another? A. No, there was only the *Kittie* going
902 down there.

Q. On your way down there did any waves or sea water splash over? A. No, sir, no water went on the boat.

Q. What was the condition of those bags when you took them? A. Those were good bags.

Q. Did you deliver them at the dock at Jahns' Mills? A. I delivered them right on his own trucks; hand trucks.

Q. What did they do with them? A. They took
903 them back in the stores; two bags on each truck.

Q. Right under cover? A. Right on the stringpiece, and ran them in the factory.

Q. You saw when go in? A. Yes, sir.

Q. Did you see any of the rice that came aboard the *Harry F.*? A. I saw some of the bags, but I wasn't long there; I was only there about a couple of hours, and then we went away.

Q. When you pulled out did you see him pull in again? A. Yes, sir, and he went right in along-
904 side the steamer when I went out.

Cross-Examined by Mr. Kilbreth:

Q. How was this rice slung into your barge? A. Some drafts were five and some were six bags in a sling.

Q. Did you come from No. 3? A. Yes, sir.

Q. Did you go on board the ship? A. Well, I went across when I went up and signed.

Q. Did you look down the hold? A. I looked down the hatch.

Q. Could you see where the rice was being taken from; what part of the hold? A. There was very near a square; right underneath the hatch; what I got.

Q. As the rice came along to you what inspection of it did you make as the sling loads came down? A. It was good; all those bags I took were good.

Q. You didn't have to send any bags back? A. 906
No, sir, we had orders to take 500 good bags to bring down to the mill.

Q. And they put 500 good bags in, one right after the other? A. On the *Kittie*.

Q. What did they look like? A. They looked good.

Q. What do you mean? A. There were no spots on them, and not mouldy.

Q. What was the color of the bags? A. The same as they come; white and gray; the difference 907
of the cloth.

Q. What sort of cloth are these bags covered with? A. Rough twine or threads.

Q. You say its color is gray? A. Well, the bags were a kind of a light gray.

Q. Could you see any of the bags on the *Harry F.*? A. Well, I seen near the whole top tier when I went across the *Harry F.*

Q. What was the color of them? A. Some were kind of wet; and some were mouldy, some of the 908
bags.

Q. Were any of them spotted? A. Well yes; there was some damaged or wet.

Q. Did any of them look spotted with damp? A. Yes.

Q. How long were you taking on these 500? A. About two hours.

Q. During all that time the *Harry F.* was lying right alongside of you? A. Yes, sir, she was laying alongside.

Q. With her cargo uncovered? A. Well, it was the middle of that day; a fine day, the same as now.

Q. Do you know how your bags were marked? A. Well, I couldn't say that, whether they were a diamond and L or M on the bags; there was either one I guess; either L or M.

Q. One or both of those letters? A. No; there
910 was only one letter; it was either L or M I guess; but that is a thing I can't say.

Q. With a diamond? A. Yes, there was a diamond on them.

Q. What pumps have you got on your boat? A. Iron pumps.

Q. Hand pumps? A. Yes, sir.

Q. When did you sound your bilges last before you came alongside the *Folmina?* A. When I got alongside the steamer.

911 Q. What did you find when you sounded when you got alongside the steamer? A. There was no water in her, but about an inch. which we can't get out of her.

Q. When did you sound again? A. When she got the bags on.

Q. What did you find then? A. We couldn't get any water.

Q. When did you sound again? A. When we came to the Atlantic docks, after being towed.

912 Q. How long was that after you left the *Folmina?* A. That was about half an hour from the *Folmina* down to the Atlantic docks.

Q. Do you usually sound every half hour? A. When we have a load on, yes, sir.

Q. That is the practice; to sound every half hour when you have a lead on? A. Yes, sir, or go down in the hold and see if there is any water there.

Q. How long have you been a lighterman? A. Well, about sixteen or eighteen years; sixteen any way.

Q. Who owns the *Kittie?* A. Stearns.

Q. What is her size; her length and beam? A. On her deck she is 44 feet, on the deck where she carries freight, and she is 28 feet beam.

Q. You say she is about thirty years old? A. Yes, sir, she is about thirty years.

Q. How long have you been in command of her? A. About eleven years I have been in her.

Q. Do you carry a mate on board? A. Yes, 914
sir.

Q. Anybody else? A. No, sir; only the two.

RE-DIRECT EXAMINATION by Mr. Thacher:

Q. During the eleven years you have been on her has she been repaired? A. She has been in the dry dock; when the old man lived she was there once every year; now she is only there—well, the year before last she was in the dry dock.

Q. In 1900? A. Yes, sir. 915

Q. Do you have a flooring of bottom boards? A. Yes, sir, down below it is all flooring all over.

Q. Were those boards dry when you discharged your cargo at Jahns' Mills? A. Yes, sir.

Q. You spoke of seeing some of the bags in the barge *Harry F.*, when you were loading; did you see any of those bags very black and badly damaged? A. Yes; half or the corner was damaged and stained.

Q. Hard; caked? A. Yes, sir. 916

Q. You say they were hard? A. Yes, sir, they had been wet, and when they happen to lay on a board in the sun they get hard as a stone.

917 THOMAS SCOGLAND being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Thacher:

Q. What is your business? A. I am in the fish business just now; I am a fish dealer.

Q. What was your business in May 1901? A. I was captain of the lighter *Portland*, belonging to Jarvis & Co.

Q. At that time how long had you been engaged
918 in the lightering business? A. About four years.

Q. Did you take any rice from the steamship *Folmina* in May 1901? A. Yes.

Q. Do you know Captain Soerensen? A. I do, yes, sir.

Q. Do you know the barge *Harry F.*? A. I do.

Q. Was she there at the same time you were? A. She was there ahead of me.

Q. Did you load any rice while the *Harry F.* was loading? A. No, sir.

919 Q. Did you see any of the rice which went on board from the *Folmina* to the *Harry F.*? I saw about half of the cargo.

Q. When did he go away from the ship? A. He went in the morning about eleven or half past eleven I suppose.

Q. Then did you move in? A. Yes; he was through somewhere a little after ten; between ten and eleven.

Q. Did you then begin to load cargo? A. Right away.

920 Q. From what hatch? A. No. 3 hatch.

Q. Did you go on board at all? A. Oh, yes. I went on.

Q. Did you look down the No. 3 hatch? A. I did, casually.

Q. When did you first look down? A. I was on board before I started to load.

Q. When you began to load what was the condition of the bags that came on board? A. The drafts there was no damage in sometimes, and then in others there was two and three.

Q. Did you notice the condition at all of the bags which came on board the *Harry F.*? A. Well I did, yes sir. 921

Q. How did your bags that first began to come out compare with those that went on board the *Harry F.* last? A. Mine appeared to be a little bit more damaged than his.

Q. And as you continued to take cargo from the No. 3 hatch did your bags get worse or better? 922
A. Worse.

Q. Much worse? A. Oh, yes, sir; at first they weren't worse, they weren't as bad as they were the second day.

Q. How many days did you load rice? A. Two days.

Q. How many nights did you lay there? A. One night.

Q. How was the weather during the two days and the one night that you lay there? A. Fair 923
weather.

Q. Is it your practice or not at night to cover up your cargo? A. Always cover up at night.

Q. Did you cover it up the nights that you lay there? A. Yes, sir.

Q. You say the rice that you got the second day was more damaged than the rice you got the first day? A. Yes, sir.

Q. Will you describe how that rice looked; what the damage looked like? A. Part of the bags— there was no bags that were actually damaged 924
right through; half of the bags, or the corners of the bags was damaged, discolored, green and black; and others again were just a little colored green or black, and others again had just spots on; some of the bags were so bad they would fall to pieces; rotten.

Q. What was the color of the rice that fell out of those bags? A. Green and black; most of it was black and caked.

Q. Was it very lumpy? A. Whatever was fell

out. Whatever was very bad was actually in cakes.

Q. What was the worst of the cargo that you got on your barge, with reference to the time of loading it? A. About the last of it; about the last I took off.

Q. About how many bags did you take altogether? A. A little over 3,200; about 3,200 and
926 fifty some bags.

Q. How old was your barge at that time? A. I should say she was about three years.

Q. Was she tight? A. Oh yes, sir, she was called a new boat at that time.

Q. What is your freeboard, light? A. About six feet.

Q. And with about 3,200 bags on board what freeboard would she have? A. Three feet.

Q. Do you have any pumps? A. Yes, sir, a
927 pump in each end.

Q. Hand pumps? A. Yes, sir.

Q. When had you last pumped the bilges before you began to load cargo? A. She never made any water as long as I had any load on her; not a drop.

Q. Did you pump the bilges before you began to load cargo? A. We always do before and after.

Q. Did you in this case? A. Yes, sir.

Q. What did you find? A. No water; just a little foam; that was all.

Q. Did this rice smell badly or not? A. There
928 was a bad odor; whatever was damaged.

Q. When you went on board the *Folmina* did you look down through the No. 3 hatch at all? A. Sometimes I did, when I was on deck.

Q. Could you see where the damaged bags seemed to be coming from? A. It seemed more on one side than on the other; more on the inshore side; the starboard side.

Q. That was of No. 3 hold? A. Of No. 3 hold; that was where we took the rice.

Q. Do you know the Barge *Rymer*? A. I do, yes.

Q. Was she there while you were there? A. She got there just a little before I was through loading.

Q. Did you see any of the rice that came on board the *Rymer*? A. I saw about five or six hundred bags.

Q. How did they compare with the rest? A. 930
they were worse than mine.

Q. Do you mean wetter and more badly stained? A. More damaged altogether.

Q. How were they as to color? A. They were black and discolored altogether; that is, I wouldn't say every bag, but the most part that they got in the hold; all the damaged bags that they could get hold of in the ship at the time was going to go in the hold of the *Rymer*.

Q. Did they go on board? A. They did, yes. 931

Q. Was the *Rymer* a new or old barge? A. She was new; she was one year newer than the *Portland;* she was about two years old at the time.

Q. What is a full cargo for you? A. I couldn't carry any more rice than what I had on.

Q. Where did you take your cargo of rice? A. To the Union Stores.

Q. How did you go down there? A. The tug-boat *Charles Kuper* towed me down there. 932

Q. Any other lightersin the tow? A. No, sir.

Q. How was that day as to the weather? A. Fine weather.

Q. Did you cover that rice before going down? A. Always, yes.

Q. On the way down did any water or waves come over or slap over the sides of your lighter? A. No sir.

Q. You were on board? A. Yes, sir.

933 Thomas Scogland.

Q. Where did you discharge your rice? A. At Union Stores.

Q. Did you discharge it on the wharf? A. At the bulkhead.

Q. Did you see what became of it? A. It went in the stores; they put it on trucks and it went in the stores.

Q. You saw all your cargo go in? A. Yes, sir.

934 Q. When you had emptied your lighter did you look at the flooring of your lighter at all? A. Yes, sir.

Q. Were there any signs of dampness or wet; had she leaked? A. No, sir.

Q. Did you deliver that rice at the wharf in the same condition in which you received it? A. I did, yes, sir.

Q. While you were unloading your rice did you see the barge *Rymer* come along? A. She got

935 there before I got through.

Q. Before you finished discharging? A. Yes, sir.

Q. When she came there did she have tarpaulins on? A. Yes; she was all covered.

Q. What tug brought her down? A. The same tug; the *Charles Kuper*.

Q. Did you see her unloading? A. I saw part of it going off.

Q. When you were unloading was it good wea-

936 ther? A. Yes, sir, fine weather.

Q. Have you seen other cargoes of damaged rice in your experience as a lighterman? A. I never have, no sir.

Q. You never have seen other cargoes? A. I have seen them stained bad,, but not damaged as that was; we always get more or less stained bags. but not as bad as that was.

Q. You mean you never saw such badly damaged bags? A. I never saw such badly damaged bags.

Q. Did any of the bags that you took on board break? A. Yes, sir.

Q. About how many bags do you think you saw the *Rymer* take on before you left the *Folmina*? A. I should say about five or six hundred bags, according to the way we got them.

CROSS-EXAMINED by Mr. Kilbreth:

938 Q. What is the length and beam of the Portland? A. About 75 feet length and 29 feet beam.

Q. Square end? A. Yes, sir.

Q. When was she built? A. I wasn't on her when she was built, but ——

Q. Do you know when she was built? A. I remember the time she was built.

Q. When was she built? A. She would be about five years old now.

Q. By whom was she built; do you know? A. 939 Yes, sir, she was built in 26th Street, Gowanus.

Q. How long had you been on board of her as master at that time? A. About a year and a half.

Q. She is an uncovered lighter? A. Yes, sir.

Q. The same as the *Harry F* and the *Kittie* and the *Rymer*? A. The same thing.

Q. When did you get alongside the *Folmina*? A. I got alongside the day that the *Kittie* was working there; I don't exactly remember the date, but I think it was the 14th or 15th.

940 Q. You say you got there when the *Kittie* was there? A. Just when she was through working, and then I came there; just about the last she got on.

Q. It has been testified that the *Kittie* loaded her cargo on the 16th of May? A. That was the day I got there.

Q. You got there just about as she was finished? A. Yes, sir, just about as she was finished.

Q. Where did you come from? A. I had been

941 working for Jarvis, before that; and I was just chartered for that load.

Q. What sort of cargo had you had on before that? A. I had some mineral water in cases.

Q. You didn't work any the first day you got there, did you? A. No, sir.

Q. You didn't work the next day until the *Harry F* had finished? A. That is right.

942 Q. So that your boat was lying alongside the *Folmina* for about a day before you did any work? A. Very near a day, yes.

Q. During that time where were you? A. In the time we are supposed to be on the boats—I was there from seven in the morning till six at night.

Q. Where were you actually? A. I was on the boat; on the *Harry F*, and when I wasn't there I was on my own boat.

943 Q. Were you on the *Kittie* at all? A. I wasn't.

Q. How often did you go on the *Folmina*? A. That is pretty hard to say; I went there off and on whenever I had occasion.

Q. What occasion did you have to go on her? A. Once in a while he stopped, and once in a while he wanted to see what the reason was; sometimes I went up.

Q. How often did you go up? A. About three or four times in a day probably.

944 Q. Did you look down No. 3 hold where they were working? A. I generally did.

Q. When did you first look down No. 3? A. As soon as I got alongside the boat I went on board the ship and looked down.

Q. What part of the No. 3 were they working? A. They were working the between-decks at the time.

Q. What part of the between-decks? A. In the wings; out from the hatches.

Q. Is this a laid between-decks? A. As far as I can remember it was only beams.

Q. Did you see the damaged bags going on board the *Harry F*? .A. I saw part of the cargo; part of her last cargo.

Q. Was there any conversation or talk among you lighter captains as to that damage? A. There was.

Q. What was the nature of the talk? A. We 946
were asking ourselves which way we were going to sign for it.

Q. What do you mean by that? A. Keeping tally; there was too many to keep tally; we had to let it go so that we could call it "more or less."

Q. What do you mean by which way you were going to sign? A. I mean on account of the amount; there was so much of it.

Q. Did you have any discussion as to the nature of the damage; what caused it? A. We decided 947
it was salt water stain, or damage.

Q. What made you decide that? A. We didn't see what else it could be.

Q. That was your reason for calling it salt water? A. It seemed as though it came through the hatches.

Q. Did you make any inquiry on board the ship as to how that damage had happened?

Objected to.

948

A. There is generally no crew on board, and there was only stevedores' gangs, and they couldn't give us any information; nobody except the stevedores and maybe the captain; but we didn't see much of him.

Q. Did you actually make any inquiry at all? A. We made inquiry to the stevedore himself; that was the only man.

Q. What stevedore was that? A. I can't recollect his name now; I know the man though.

949

Q. What does he look like? A. He has dark whiskers; a full beard like.

Q. Do you mean that he has a beard? A. Yes, sir, he has a beard.

Q. What was he; the superintendent stevedore? A. Yes, sir, the superintendent stevedore; I could remember his name if I heard it, but I can't recall it just now; I have seen him time and time again.

950 Q. The first night you lay alongside the *Folmina* you had nothing on your lighter, did you? A. Nothing at all, no, sir.

Q. You didn't spread any tarpaulins or covers out, did you? A. No, sir.

Q. Did you sound your pumps the first day you were there? A. Yes, sir.

Q. How often? A. We generally do it morning and night; I did it that morning, and again when we started to load; we always do.

951 Q. Do you ever do it oftener? A. Yes, in the middle of the day, when we think the boat is making any water we have to do it every few minutes.

Q. Did you do this on your lighter? A. We did.

Q. Every few minutes? A. No, there was no occasion to; our boat was new and we pumped her out in the morning, when we started.

Q. Then you didn't pump your boat out any oftener than morning and night? A. That is all.

Q. Did you see the *Kittie* or the *Harry F* being

952 pumped out? A Not at the time; the *Kittie* was then only there about ten minutes at the time I was there; that is all.

Q. Did you see the *Harry F* being pumped out? A. In the evening, yes sir.

Q. At no other time? A. At no other time.

Q. That was the evening of the first day you were there? A. In the evening of the first day we were there; he might have pumped in the morning, before I got there the next day.

Q. You don't know about that? A. I don't know anything about that.

Q. At what hour of the day did you begin to load? A. I should say about half past ten in the morning.

Q. What hour did you finish? A. Between two and three in the afternoon the next day.

Q. How many bags did you take on the first day? A. Somewhere around 1200 bags; I shant 954 say for sure.

Q. Of those 1200 bags how many were damaged? A. As far as I can remember I think there were 75 damaged bags.

Q. Of the remaining 2000 bags that you took the next day how many of those were damaged? A. Then the tallyman and me got the agreement that we should call it "more or less"; there was so many damaged that we couldn't keep track, because he was standing on the deck and tallying, 955 and I was on my boat, and we couldn't keep any track.

Q. Of those 2000 bags that you took on on May 18th how many in your recollection were damaged? A. According to my estimate there should be about 200 bags at least, anyhow.

Q. You say that when the bags were first put on board your boat they showed more damage than the bags that they had just finished putting on the *Harry F.*? A. That is right. 956

Q. And that it gradually got worse with the others? A. Yes, sir, gradually worse.

Q. What did the bags look like that came on to you at first? A. They were mouldy and black and green, and yellow and mouldy looking.

Q. They gave evidence of moisture, did they? A. Well, yes.

Q. And they got worse as the loading went on? A. Yes; some were so bad that there were holes in

957 the bags, and we had to mend them; get them mended.

Q. What did the good rice look like? A. The color of those bags was a light yellow, or the natural color of a burlaps bag.

Q. You have never had any other experience with rice bags, rice cargoes? A. Not in the line of damage; I have had several cargoes of rice.

958 Q. But you have never seen any damaged rice? A. No, I have never seen any damaged rice.

Q. Have you seen other bag cargoes damaged? A. I have had sugar and different kinds of bags except rice.

Q. And they all display practically the same signs? A. Different sizes of bags.

Q. I mean that when a bag is damaged by moisture it becomes black and discolored, that is the color of moisture on bags? A. Yes, that is

959 right.

Q. When did the *Rymer* get there? A. She got there somewheres around dinner time the day I finished.

Q. She cut in, did she? A. Right alongside of me, and when I was through we hauled away.

Q. She waited until you finished before she started to load? A. Yes.

Q. How long did you stay around there after you finished loading, before you started to the

960 Union Stores? A. About two hours.

Q. You were waiting for a tug? A. Yes, we were waiting for a tug.

Q. The bags that went on the *Rymer* were worse than the bags that went on your boat? A. They were worse, because they were going to get all the damaged bags together and put them in the hold, in his hold; all the rest of the cargo.

Q. The *Rymer* was there for the special purpose of taking all the bad bags that they could get to-

gether? A. Yes, and she was there to take all the rest of the cargo that was left in the ship too.

Q. How big is the *Rymer*? A. The *Rymer* is about 85 feet long and 30 feet wide.

Q. What is her freeboard light, do you know? A. She may have about six inches more than the one I have.

Q. And loaded? A. About the same.

Q. What was your freeboard loaded? A. Loaded with rice, three feet.

Q. How were these bags brought over from the *Folmina* on to the lighters? A. They were put in drafts, five at a time; five or six in slings, and hoisted up by steam and landed on a skid on the rail, and then we took them with our purchase and slung them on our boat.

Q. A skid is erected on the rail; a landing stage is erected? A. That is right.

Q. Do you have a donkey engine on board your boat? A. We have a hand winch.

Q. And you put your purchase around and let it come down to the bottom of your boat? A. That is right.

Q. How were these bags stowed? A. We started and put them two high, one on top of the other, and then two behind, and we get six bags in a sling and get two behind and then go right along half of the boat at a time; pile them about ten high.

Q. Do the bags run fore-and-aft or athwartships? A. Athwartships.

Q. And the stevedores were down in your boat doing that? A. Yes.

Q. Do you or your mate have anything to do with running the winch? A. The mate always runs the winch.

Q. Did you have to gather up any loose rice on the landing stages of any of these boats that you saw loading? A. I think we had about a bag and a half of loose rice.

965 Q. Altogether? A. Altogether.

Q. Did you have to gather up any loose rice from the bottom of the lighters? A. We always do; there is always a little waste of rice; there always is.

Q. This rice that fell out of the bags that were broken you say was green or black; did you pick any of it up in your hand? A. Yes, sir.

966 Q. How did it feel; mouldy? A. Moist.

Q. Did you get any receipt from the Union Stores for your cargo? A. Not me sir.

Q. You don't keep a log, do you? A. We did, but I have lost it now.

Q. How did you come to lose it? A. We generally heave those things away every year.

Q. Is it usual to keep a log on board these lighters? A. Not except a handbook in the pocket.

967 By Mr. Thacher:

Q. Is that what you mean? A. That is what I mean; a memorandum for our own sake, that is all.

By Mr. Kilbreth:

Q. When did you give up lightering? A. Three weeks ago.

Re-Direct Examination by Mr. Thacher:

968 Q. You spoke of some conversation between the lighter captains and yourself, as to the manner in which this cargo should be receipted for? A. Yes.

Q. Did you mean that the discussion was whether you should give the exact number of bags damaged, or whether you would merely receipt for them as more or less damaged? A. That is what I meant; it is pretty hard for a man to look after the stowing of the bags and then keep tally of all the damage; when they come down the draft you

can't count them, and the man on deck can't see it of course.

Q. Was there any discussion as to the cause of that damage? A. As I say, I didn't talk among the crew, because we didn't see any of them; all we have got to do with those ships is just the stevedore gangs, and they come from the shore and don't know anything about it any more than we do. 970

Q. Was there any discussion among the other lighter captains and yourself? A. No, sir.—

PETER LARSON, being duly sworn and examined as a witness for the libellant, testifies:

By Mr. Thacher:

Q. What is your business? A. Lighterman. 971

Q. How long have you been engaged as lighterman? A. Twenty years.

Q. What boat were you in command of in May, 1901? A. The barge *Idaho*.

Q. What are her dimensions? A. Her tonnage is 81; I think she is about 70 feet long and 28 feet beam I think.

Q. Now old is she? A. I think she is about thirty-six year old, about; I couldn't say exactly.

Q. How long have you been on her? A. About 972 nine years; a little over.

Q. During that time has she been kept in repair or not? A. Yes, sir, she has been kept in good repair.

Q. What pumps have you got? A. I have got Boston rubber pumps.

Q. How many? A. Only one; I think that is what they call it.

Q. Hand pump? A. Hand pump, yes, sir.

973 Peter Larson.

Q. Did you in May, 1901, carry any damaged rice from the Union Stores? A. Yes, sir.

Q. On board the *Idaho?* A. Yes, sir.

Q. Where did you take it to? A. Pier 40, North River, Steamship *Minnehaha.*

Q. How many bags did you take, about? A. So far as I remember I think it was 876.

Q. What sort of a day was that when you
974 loaded? A. It was raining a little in the morning, but I didn't work—I waited till it cleared up; it cleared up later.

Q. Did you take any rice on when it was raining? A. No.

Q. Where did the rice that you took on board the *Idaho* come from? A. It came out of the Union Stores when I took it.

Q. Did you see it come out? A. Yes, sir.

Q. How did it come out? A. On horse trucks,
975 trucks pulled by horses.

Q. Was it put on board your lighter? A. Yes, sir.

Q. When do you pump your barges out? A. When we were loaded, if it was necessary.

Q. Did you pump out your barges before you took this cargo on? A. Yes, sir.

Q. Did you find any water? A. No; very little water.

Q. How was the flooring of your lighter before
976 you put the cargo on? A. It was all dry.

Q. What was the condition of these bags of rice that you took on board the *Idaho?* A. They were in bad condition.

Q. Describe them? A. They were damaged; some of them caked and torn and sewed up again, etc.

Q. What color were the bags? A. Some of it was mostly black and green.

Q. Had you had much to do with rice cargoes

977

in this port? A. Well, sometimes; I have had not so very much to do.

Q. Have you seen damaged rice before? A. Yes; I have seen some damaged before, but not such a big lot of damage as I had that time I never saw.

Q. How did this rice look compared with other damaged rice that you have seen? A. There might have been other kinds; an odd bag would look like this; but not so many as this.

978

Q. After you put this rice on the *Idaho* did you cover it or not? A. Yes, sir, I covered it.

Q. With what sort of coverings? A. Canvas covers; sidecloths first, double covering, and then what we call a big cover to set up; that is made of canvas.

Q. What is a full load for the *Idaho?* A. About 1,800 or 1,900; I know I have had as much as 1,900.

979

Q. How much freeboard would she have then? A. I should say only about a foot then.

Q. How much would she have with the cargo that you carried on this day? A. About—I couldn't exactly say; probably about five feet I should think.

Q. How much freeboard has she got light? A. I never measured her.

Q. Well, about? A. She don't go down much with 800; about six feet I suppose, light.

980

Q. How did you get around to the *Minnehaha;* were you towed around? A. I was towed around by one of Kuper's boats.

Q. Any other lighters in the tow except yourself? A. No; I was all alone.

Q. What day was that? A. The same day I loaded; I think it was the 29th of May.

Q. About how long did it take to get around? A. Oh, about three-quarters of an hour, probably.

Q. On the way around did any waves or water

from the river slap over or come into your boat? A. No, sir.

Q. How was the weather during the trip? A. It was fine weather in the evening, and all the afternoon it was fine weather.

Q. About what time did you get around to the pier where the *Minnehaha* lay? A. That I hardly remember; I think it was somewhere around six
982 o'clock; somewhere in the evening; around six it was.

Q. Did you then put your cargo on board? A. No, sir.

Q. How was the weather that night? A. It was fine weather that night.

Q. Were you on board? A. No, I wasn't on board that night; but I had a man there.

Q. Did you leave the covering down? A. It was over all the time.

983 Q. It stayed there during the night? A. Oh, yes.

Q. The next day did you put your cargo on board? A. No, not the next day; that was a holiday; it was Decoration Day; I didn't work that day.

Q. Do you remember the weather that day? A. It was a warm day, I remember that, a sunny day; a fine day.

Q. The night of the 30th were you on board at all? A. No, I don't think I stayed on board that
984 night either; I had two men with me, and the other man stayed there.

Q. When did you come back? A I was there on the 30th; I came in the morning and I stayed there that day until the evening again.

Q. Then when did you next come back? A. I next came back at half past six the following morning, of the 31st.

Q. Were your coverings on them? A Yes, sir.

Q. When did you begin to put your cargo of

rice on board the *Minnehaha?* A. I think we began at seven o'clock that morning, or half past seven, or somewheres around there.

Q. Did you see the cargo go into the ship? A. Yes sir.

Q. After you had unloaded your 876 bags from the *Idaho* did you look at the floor boards at all? A. Oh, yes.

Q. Were they dry or wet? A. They were dry. 986

Q. No water in your boat? A. No; no, sir.

Q. Did you put those bags on board the *Minnehaha* in the same condition that you took them? A. Yes, sir, in the same condition as I took them.

CROSS-EXAMINED by Mr. Kilbreth:

Q. The *Idaho* is an uncovered barge, is she? A. Yes, sir, uncovered.

Q. Thirty-six years old? A. Well, I wouldn't swear to the age of her. 987

Q. A ripe old age at all events? A. But she has been rebuilt in that time, since I have been on her.

Q. When was she rebuilt when you were on her? A. Four years ago she was partly rebuilt; four years last August.

Q. And that is the last time she has been? A. Two years ago; we go on the dry dock every year.

Q. That is for your ordinary repairs that every boat has to go through, isn't it? A. Oh, yes, we 988 go there every year.

Q. No general overhauling, so that you are rebuilt every year? A. No, not rebuilt.

Q. Just looked over? A. Just looked over and painted up and caulked if it is needed.

Q. You say you took on 876 bags on the morning of May 29th at the Union Stores? A. Yes, sir.

Q. What was the appearance of those bags as they came on board your boat? A. Well, they were damaged bags.

Q. How could you tell that? A. The bags were discolored; green.

Q. Were they moist? A. Yes, moist also.

Q. Did they feel moist to the touch? A. Yes, they felt moist and even smelled some.

Q. Would your hands show any moisture after touching the bags? A. That I don't remember; probably they would.

990 Q. What was the nature of this discoloration on the bags? A. Well, there must have been water on them; they must have been wet and dried again.

Q. That is what it looked like? A. That is what it looked like, and they must have been wet for the bags were partly rotted away; that was the way they looked.

Q. When did you arrive alongside the Union Stores wharf? A. I think I came there in the 991 evening of the 28th.

Q. Did it rain that night? A. Yes, there was a little rain that night; yes, it rained that night.

Q. It rained some the next morning? A. Some.

Q. When did it stop raining? A. That I don't remember somewhere along the forenoon; I didn't start until it stopped raining; but I don't remember the time.

Q. Had they taken out the bags from the storehouse before you started to load on your boat? A. No; I took them on the boat as fast as they came 992 out of the storehouse.

Q. You went over to Pier 40, North River? A. Yes, sir.

Q. What time did you reach there in the evening? A. I think somewhere about six o'clock; I am not sure about that.

Q. You made fast and then went home? A. Yes, sir.

Q. When did you come back? A. The next morning.

Q. Stayed on the boat all the morning? A. All day.

Q. You went home the following night? A. I went home the following night.

Q. So that they didn't begin to load until the 31st of May? A. Yes, sir.

Q. How long did it take them to load? A. That I don't remember either.

Q. Did you finish that day? A. Oh yes, I finish- 994
ed that day; somewhere around five hours.

Q. During any time from the moment you began to load at the Union Stores until the *Minnehaha* had taken all of these bags was there any rain? A. No, there was no rain; it didn't rain.

Q. You are quite sure of that? A. If I can remember; it rained some in the morning, but I didn't begin to load until the rain stopped; after that there was no rain; not that I can remember.

Q. Tell me about your pumping out your boat; 995
how often did you do that? A. I umped her out in the evening when we got there, there was nothing there to pump.

By Mr. Thacher:

Q. You are speaking about what evening, on the 29th? A. Also on the 30th.

By Mr. Kilbreth:

Q. You pumped out every evening? A. Oh 996
yes, sir, we always look at her every day and if there is no water we don't pump her; because we can't get any.

Q. And that is the only sounding you took in the evening? A. We look at her probably three or four times a day.

Q. Do you expect leaks? A. No; especially every time we tow we look at her.

Q. Why do you look when you tow? A. In case of accidents that should happen.

997 Peter Larson.

Q. What sort of accident do you look for? A. To look if there is any water.

Q. How would the water get there? A. I never get any there so far; but it could happen.

Q. But you always look there three or four times a day when you tow? A. Yes.

Q. Why do you look there when you tow any more than any other time? A. In case there
998 should be any water.

Q. How would the water get there? Don't let us go around in a circle. A. If the boat should spring a leak, or anything.

Q. Because she is an old boat; isn't that the reason? A. That might be too, because there is more pressure on her when a boat tows than any other time.

Q. You expect that an old boat, like the *Idaho*, will develop leaks when she is put to any use at
999 all, and that is the reason you look to your pumps three or four times when you are towing?

Objected to.

A. Yes, I look at the boat so that she don't get full of water; but she has never made any water much; very little.

Re-Direct Examination by Mr. Thacher:

1000 Q. Between the time that you took on board this rice at the Union Stores until you put it on board the *Minnehaha* was there any leak in the *Idaho*? A. No, sir.

Q. Does she leak every time she is towed? A. No, not every time she is towed; but I say I look if she should.

Q. Then you merely look as a precautionary measure; you merely look to be sure? A. Merely look to be sure; that is all.

Q. How did the bottom boards of the flooring look when you discharged your cargo on the *Minnehaha*; were they dry or wet? A. They were all dry.

Q. Did you sound your pumps the night that you arrived at the *Minnehaha*? A. Yes, sir.

Q. Did you find any water? A. No.

Q. Did you sound them the next morning again? A. Yes.

Q. Did you find any water? A. No. sir.

Q. Did you sound them again the night of the 30th? A. Yes.

Q. Did you find any water? A.No, sir.

Q. Did you sound them again the next morning, the 31st? A. Yes, sir.

Q. Did you find any water? A. No. sir.

RE-CROSS EXAMINATION by Mr. Kilbreth:

Q. How was this rice stowed in you boat; how was it distributed? A. I stowed it on deck.

Q. Was it in the forward or the after part, or the starboard side. or the port side, or where? A. The after part; it starts from aft and went right along; I don't remember exactly; I had them about five up on the after part, but a little further than the hatch; I don't remember exactly now.

Q. How many tiers up did they go? A. I think I had them five.

Q. Where is your pump? A. Aft.

Q. Do you know the lighter *Portland*? A. Yes, sir.

Q. Does she belong to the same company as the *Idaho*? A. No, sir, she belongs to another company.

Q. Who does the *Idaho* belong to? A. She belonged to a man named Frank Ketzler at that time; now she belongs to McCreery.

1005 Gustavus Otway Herbert.

New York, July 7th, 1903.

Testimony taken out of court on behalf of libellants.

Present—Mr. Brown for Libellants.
Mr. Kirlin for Claimants.

1006 It is understood that if it is necessary to rebut the testimony of Mr. Herbert, claimants' counsel has the right to do so.

Gustavus Otway Herbert, being duly sworn and examined as a witness for libellants, testifies:

By Mr. Brown:

Q. What is your position and occupation? A. Surveyor at Lloyds Register.

1007 Q. For the United States? A. I am stationed in the United States at present; I am a naval architect by profession.

Q. How broad is the territory over which you exercise supervision in your capacity as surveyor in Lloyds Register? A. What is known as the New York District.

Q. Are you the successor of Thomas Congdon? A. One of the successors.

Q. How much experience have you had in the

1008 construction or surveying of vessels such as would give you familiarity with their qualities of seaworthiness? A. I have been about twenty years.

Q. Either as a constructor of vessels or a surveyor? A. Designer, constructor and surveyor.

Q. Is is possible that a properly constructed vessel may open a seam in her side plating in a sea-way or storm so as to admit water into the hold of the vessel without leaving any plain indications of that fact that would be noticed on the

arrival of the steamer in port? A. No, I think it would be impossible.

Q. If a vessel were to open a seam in a sea-way as suggested, how would that fact be known on arrival? A. By slack rivets, by rust in the inside of the vessel and on the outside and by the seam itself being opened and requiring caulking.

Q. I infer that you intend to testify that a seam once opened in a sea-way will remain open, is that your testimony? A. It would show signs of having been opened.

Q. Would that fact be easily discovered on examination? A. Yes, quite easily.

Q. Can the appearance of rust be removed by paint or not? A. Yes.

Q. Then the reliable test would be the noticing that the seam was open and the rivets were loose? A. Yes, the rivets principally; the rivets would show it more easily than anything else.

Q. Is it or not a common thing for vessels to leak around the collars of their scupper pipes?

Objected to as immaterial and irrelevant.

A. Yes, sir; it has occurred in many cases.

Q. Could a leaky collar be cured so as to be no longer leaky with ease or in what manner could it be cured?

The same objection.

A. It could be cured by screwing up the nuts of the bolts, which would stop the leak.

Q. If a collar had been leaky and the leak had been stopped in the way you suggest, would that fact appear upon examination?

The same objection.

A. Not necessarily.

1013 CROSS-EXAMINATION by Mr. Kirlin:

Q. Is there any difference between steel and iron plating with regard to its yielding or springing under strain such as very heavy water? A. No, not of the thickness in modern ships.

Q. Isn't it a fact that steel ships roll and twist more in a sea-way than iron ships? A. No, not a

1014 fact.

Q. What experience have you had in observing that actually at sea? A. I have been out on numerous trial trips and I have crossed the ocean once or twice.

Q. Isn't it a received fact that iron vessels of the older type are more rigid in sea-ways than modern steel ships? A. They are more rigid because they are built of heavier scantlings but that is not the difference between iron and steel.

1015 Q. It is a practical difference isn't it that with steel vessels they build them with thinner scantlings than they do with iron ships? A. Yes, they do; that is true.

Q. And as a practical result the steel vessels as they are built commonly are more flexible in a sea-way than iron vessels as they are ordinarily built? A. No, I wouldn't admit that.

Q. Isn't that the generally received impression? A. No; if you take two vessels of exactly the same size and build one of scantlings of steel and an-

1016 other one of iron, I don't believe there would be any material difference between the two ships; certainly not an observable difference.

Q. There would not be if scantlings were alike in both? A. No, but using the lighter scantlings it is a very small degree less with steel than using the ordinary scantlings of iron.

Q. Have there not been known to be instances where vessels have strained sufficiently to allow water to come through the seams and to have found the seams closed again at the end of the

voyage, so that they did not actually leak? A. It would certainly show. 1017

Q. You are talking about signs now, but I am talking about leaks? A. If the seam opened it couldn't close again.

Q. Can that be stated as a general principle of universal application? A. Yes, certainly; if a seams once opens it is bound to show.

Q. The question is is it bound to leak always if it leaks once under strain? A. Yes, the seam is opened and won't close again unless it is closed by mechanical means. 1018

Q. Of course there are degrees of opening. I am speaking of opening enough to leak without being wide open. To allow a seam to open sufficiently to leak some rivets would have to get slack; the seam couldn't open unless the rivets got slack.

Q. Haven't there been instances where vessels stretched their seams and rivets sufficiently so that the elasticity in the metal yielded enough to let in water and the seams closed up afterwards so that they didn't actually leak? A. The rivets are then loose. 1019

Q. You don't quite get the point that I mean to ask you. I am not speaking of a case where the straining is sufficient to leave the rivets loose nor to leave the joint open; but what I want to inquire is whether there have not been known to engineers instances where the seams of vessels, either in the joints of the plates or in the butts have yielded enough by reason of the elasticity in the metal to admit of leaks during the voyage which have closed up at the end so that the place where the leak was no longer leaks? A. I think that is impossible. 1020

Q. You have had no experience of anything of that sort? A. No; I have had experience of seams opening but there have always been signs that they have opened.

1021 Q. That is another thing. The question is whether you have had any seams that have opened and left no signs except discoloration of the paint or signs of that sort. A. It would leave more than that. For a seam to open it means that the calking has sprung—the calking cannot spring unless the rivets loosen.

Q. Unless the rivets yield that would be so? A.
1022 If a rivet yields it will loosen, it won't go back into its place again tight.

Q. Whether it will yield enough to leak and still go back? A. No, sir.

Q. Not in your experience? A. No, sir; it couldn't do it.

Q. You say there have been no known instances of that as far as you know? A. Certainly I have never come across any either in my own experience or heard of them.

1023

Gustave A. Jahn recalled:

By Mr. Brown:

Q. You are one of the libellants in this case and have been examined as a witness? A. Yes, sir.

Q. Upon your examination you stated among other things, that you were present during the
1024 discharge of the steamer *Folmina*. Please state whether you were in error in your previous testimony and if so to what extent. A. I made such a statement at that time, but I found that about half of that cargo had been removed before I had seen any of it and shipped away, and a portion of it milled here.

Q. Where were you when the *Folmina* arrived? A. I was in Texas.

Q. On what day did you reach New York? A.

1025

I reached New York on the 15th of July or a day or two previous to that.

Q. When you reached New York where was your cargo ex *Folmina?* A. It was at the Union Stores, foot of Sedgwick Street, Brooklyn.

Q. All of it? A. About 5,000 bags of it were still remaining in the store at that time.

Q. Had any of it been already exported? A. Yes, about half of it.

1026

Q. State what had been exported according to your records? A. There was one shipment on May 29 of 876 bags bags; another one on June 24th of 2240 bags and one following that same day or a day later of 2240 more. Those had been exported prior to my return and on July 22nd the exportation was 2624.

Q. That was an additional exportation after your return? A. That was the final after my return, yes, sir.

1027

Q. Was any of the rice at your mill at the time you came to New York? A. Yes, they were hauling it on the morning of the 18th of July.

Q. Taking it from the store to the mill? A. Taking it from the store to the mill; I was there at that time.

Q. Where is your mill? A. On the Atlantic dock front on the East River alongside of Hamilton Ferry.

Q. What examination of this rice did you actually make? A. I examined the goods the same as I always do nearly every shipment that comes along and goes through the mill when I am handling goods—have the bags opened up and if I notice anything that is external out of the way I make a careful examination of it.

1028

Q. In this case did you make any more examination than it is your habit to make in other cases of rice importations of yours? A. Yes; I went through it more carefully than the rice that

1029 Gustave A. Jahn.

generally comes in good condition when it arrives.

Q. Why did you make this special examination? A. Because we were throwing all that was damaged—exporting the damaged portion of it.

Q. As compared with other shipments was it a case of very heavy damage or medium damage? A. Very heavy damage as compared with other
1030 shipments.

Q. In your previous examination you testified in considerable detail as to the character of examination that you made and the results of your examination. You expressed the opinion that the damage you saw was sea water damage and you gave reasons for that conclusion. Will you state whether you desire to alter any of your testimony or whether that is still correct? A. What I saw of the rice as far as the damage of
1031 the packages from salt water is concerned—that stands as I gave it; but going into the minute and detailed explanation of the character of damage from salt water and my own personal inspection and attention to it, I have gotten the two vessels somewhat confused. I had a previous shipment that had also been sea water damaged and which I had given more personal and detail attention to than this one. Both were fresh in my memory at the time and I got things a little
1032 confounded.

Q. What was that other case of sea water damage? A. That was on the *Kenmore*.

Q. After having refreshed your recollection have you any reason for altering the conclusion that you expressed upon the trial that this was a case of sea water damage? A. No, there is no doubt about it in my mind.

Q. Do you wish to alter any of the reasons that you then stated for reaching that conclusion

based upon the appearance of the packages and the place of damage? A. I have no change to make.

Q. That is all correct then, is it? A. That is all correct. There is one thing more that I think I did state in that testimony previously, that when the question was put to me as to whether I had seen every one of those thousand bags, or something to that effect I want to correct that. I 1034
didn't see every one of the thousand bags.

Q. You mean the thousand bags that went to the mill? A. The thousand bags that were particularly referred to as being especially damaged and so on.

Q. Do you mean now the bags that were considered sea water damaged, bags that were particularly badly damaged? A. I have referred to 870 odd bags that were exported. Those are what I had reference to at that time. 1035

Q. Can you say from your examination whether of the thousand bags that went to the mill, certain of them was moreseriously damaged than the others? A. Oh, yes.

Q. As to those thousand bags can you discriminate between bags that were sea water damaged and bags that were not? A. Discriminate in what way?

Q. Can you say a certain number were sea damaged and the rest were not or were or were not 1036
damaged in some other way? A. No; I think they were all damaged by the same process.

Q. Before your return to New York who had special charge of the *Folmina* rice? A. Mr. Griffiths looked after the entering at the Custom House and giving the directions and orders in connection with the handling of the goods and disposing of them and so on.

Q. Who had personal supervision of the dis-

1037 Gustave A. Jahn.

charge? A. That came to my brother Mr. Ernest Jahn and the hands at the mill; Mr. Robertson, the miller, and Mr. Ernest Jahn. The rice as it passes into the mill—every bag is cut open and is thoroughly examined before it is dumped into the hoppers by inserting a hand into the bag and smelling of the rice and feeling of it, after examining the bags on the outside
1038 for the external appearance of the bag. That is our regular routine, regular system that we have. Otherwise, if we should happen to get one bag of badly damaged rice in a lot of good rice, it would ruin the whole business.

Q. Have you prepared figures that show what became of the rice, how much was realized from it in respect of the diffierent parcels? A. These figures I produce are made up by the bookkeeper from the books.

1039 Q. How much was remitted to you in respect of your four different exportations?

Claimants' cousel objects to all these questions of damage as immaterial and irrelevant at this point, and objects to the witness refreshing his recollection or testifying from a paper in respect to which there is no explanation on the record.

THE WITNESS: These memoranda I have in my hand are a copy from the books.
1040 I know that. This is my own I haven't taken it from the other.

A. On the 876 bags the net amount realized was $2587.88.

By Mr. Kirlin.

Q. What memorandum have you before you? A. A memorandum of my own data.

Q. Got from where? A. The books in my office.

Q. Taken off your books? A. Yes.

Q. You are testifying by refreshing your recollection on that, are you? A. I couldn't remember a thing of that kind for two years.

Claimants' counsel objects to this testimony on the ground that it is hearsay and not the best of evidence.

By Mr. Brown:

Q. Please finish your answer to my question.

The same objection.

A. On 2240 bags June 24th it was $7778.23; on the second shiment on that same day $7687.28; and on July 22nd it was $8686.50. Those are the four shipments that were made.

Q. Were there any expenses in realizing that amount?

The same objection.

A. Yes; I haven't that down here.

Q. Have you the proceeds of the thousand bags milled here?

The same objection.

A. $4983.30 on the thousand bags milled here.

Q. Have you the total net proceeds of all the rice including what you milled and what you exported?

The same objection.

A. On the 8980 bags the total net proceeds as I make it are $30.381.89.

Q. Who prepared this paper that you have been

refreshing your recollection with? A. I did myself this afternoon.

Q. Where did you take the data from? A. I took it from the books.

Q. Your office books? A. Our office books the books of record. If it had been desirable I might have had them here.

1046 Cross-Examination by Mr. Kirlin:

Q. When did this Kenmore, whose cargo you say you had in mind when you were testifying at the trial, arrive? A. That arrived a couple of years previous to that; eighteen months or so, I believe.

Q. Who were the agents here? A. I don't remember who the vessel came to.

Q. You say she came two years before the *Folmina* did? A. Yes.

1047 Q. In testifying at the trial did you testify about the *Kenmore* instead of the *Folmina*? A. There wasn't any case in court at the time of the *Kenmore;* the *Kenmore* matter was adjusted between the underwriters and ourselves.

Q. When you were testifying in court about the *Folmina* case as we all supposed, you were really testifying about the *Kenmore* case? A. No, I saw I got the two more or less confounded in my mind; that was the only thing.

1048 Q. You testified about them both then? A. The questions were put to me in that sort of way that I answered as the matter presented itself to my mind at the time.

Q. Have you made any explanation to the District Judge about your testimony at the trial? A. Yes.

Q. What did you tell him? A. I told him that I was in error in some things, some matters. Upon reflecting upon the testimony that I had

given after I had gone home and going over it coolly, more or less of the matter presented itself to me as—well, not exactly in accordance with the facts that bear it out; that is about it. The fact of my being more or less confused and so on, I couldn't collect my thoughts somehow or other; I was more or less embarrassed during the whole of that examination. I didn't expect to be called on at the time I went over there and I went rather hurriedly. 1049 1050

Q. As a matter of fact as I understand it, you never saw any of the 876 bags that have been stated to have been damaged to the greatest extent? A. There was a portion of them that were lying in the mill that I saw; but I couldn't say as to the exact number of them—not of the 876 that were exported, or a portion of them that had been thrown out that same time out of the thousand bags. 1051

Q. Of the 876 bags that had been exported did you see any? A. No, sir, that is what I say; I wanted to correct that statement.

Q. Was your brother who is now present at the trial? A. Yes, I think he was there.

Q. Your recollection is that he was there? A. I think he was there; yes, sir.

Q. But he was not called at the trial, was he? A. I could not tell.

1052

Mr. Brown: We admit he was not a witness.

Q. You have given some figures here refreshing your memory from a memorandum that you had in your pocket., That I understand contains some notes that you say you made from your books? A. Yes, sir, copied from my books this afternoon. After Mr. Brown sent me word that he would like to have me come up here, I just went over

1053 the books to take some of the most important items down.

Q. Who keeps the books that you took this memorandum from? A. We had a bookkeeper who is no longer with us; a man who had been with us for a number of years; a bookkeeper, a competent man. The office and the counting room of our business was principally under the charge of Mr.
1054 Griffiths.

Claimants' counsel moves to strike out the testimony about damages and values as incompetent and hearsay.

Libellants' counsel states that he called with Mr. Jahn upon the District Judge with the consent of claimant's proctor to have Mr. Jahn make the apologies to the Court for having made certain errors and inaccuracies in his original testimony; but Mr. Jahn
1055 gave an extended explanation at that time merely made his apologies.

Claimants' counsel states that he did not mean to question the propriety of Mr. Jahn's calling on the Judge or to suggest that he did not go there with the full consent of claimants' counsel, but merely wanted to inquire what was said to the Judge, as he was not there and did not hear it.

1056 Re-Direct by Mr. Brown:

Q. When did you become aware of having made a mistake in your testimony on the original trial and what steps did you take to set the matter straight? A. As soon as I got over to the office after leaving the court room I began to think. I think it was on Saturday, if I am not very much mistaken—Saturday afternoon after the court had adjourned. Then I called for my wife and staid at the Academy of Music at a fair. Along to-

wards midnight I hadn't much to do and the fair was going and I was just seated there and it gave me lots of opportunity for reflection and I began to think; and after I got home that night and got to bed I got the nightmare and it bothered me all night long; I couldn't sleep. The first thing I did Sunday morning I got up and got an early breakfast and never stopped a minute until I ran down to Mr. Brown's house and routed him up and unburdened myself of what the thing was; and I prepared to go right down to Judge Thomas then and there. 1057 1058

Q. What did I advise you to do? A. You advised me to wait until after you had an opportunty of conferring with the opposing counsel and to be guided by his wishes.

Q. And also until you had seen the record of your testimony? A. Until I had seen the record of my testimony. 1059

ERNEST JAHN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. Brown:

Q. You are associated with the last witness in business? A. Yes, sir.

Q. In what way? A. Superintendent of the rice mill. 1060

Q. What did you have to do with the rice ex *Folmina*? A. To look after it; to see as regards the damage and the milling of it, etc.

Q. Did you have occasion to make an examination of that rice? A. Yes, sir.

Q. Did you examine it frequently and thoroughly? A. Yes.

Q. State to what extent you examined it. A. I went to the vessel two or three times and saw that

1061 it was delivered in proper shape to the lighters and on looking down the hatches I saw that one side of the vessel was badly damaged.

Q. You mean the rice on one side was badly damaged? A. Yes.

Q. Did you also examine the rice after it left the vessel? A. Yes, sir; as near as my recollection goes, we had about a thousand bags I think ordered to the mill for milling, and we sorted out I think about a hundred bags out of the thousand

1062 ——

Q. Sorted out for what purpose? A. Sorted out because they were damaged.

Q. Damaged how? A. By sea water.

Q. As to the rest of the thousand what was the condition of those bags? A. The rest of the thousand we had to take and cut the bags open so as to take whatever was musty or anything of that kind from the damage originating from the others so as to separate that and put it in the hop-

1063 per and mill them separate.

Q. Was the rest of the thousand somewhat damaged or was it sound? A. I should judge it was stained; that is we could realize it was damaged by the stain on the bags. I should judge there was from 75 to 100 bags that we could tell; then we had to open the other bags, stab them, as we call it, and take a trier and push it in, and if they were in any way tainted by the other damage we would cut the bags open and cut that off and put

1064 the other in the hopper and mill it.

Q. Did you also examine the rice that was exported to England? A. Yes, sir.

Q. Have you had experience in the examination of cargoes of rice that enables you to tell whether a cargo has been damaged by sweat or sea water or otherwise? A. Yes, sir.

Q. In your opinion what was the character of damage of the *Folmina* rice?

Objected to on the ground of insufficient foundation. Question withdrawn.

Q. State what your experience has been, how you have acquired it and over what time it has extended; how has your experience been gained that enables you to tell the difference between damage to different kinds of rice? A. The examination of different vessels and the observation of damage. 1065

Q. Extended over how long a time? A. The last 15 or 20 years. 1066

Q. You have been in the rice business all that time? A. Yes, sir, longer than that.

Q. Been constantly having shipments of rice? A. Yes, sir; both foreign and domestic.

Q. In your opinion what was the character of damage to the *Folmina* rice?

MR. KIRLIN: I press the objection.

A. My opinion is that it was sea water damage.

Q. What evidence of sea water damage did you notice, distinguishing sea water damage from other kinds of damage? A. I noticed the wing on one side of the vessel was all damaged, all the way down, and the stench from the hold was fearful. If it was fresh water or sweat damage the smell wouldn't be anything like it. 1067

Q. How about the place of damage; would the cargo be damaged in the same place if it had been sweat? A. I don't understand that.

Q. Would the cargo have been damaged on one side of the vessel, as you say this was, if it had been sweat and not on the other. 1068

Objected to as leading.

A. It couldn't have been sweat because I can tell the difference between sweat and sea water damage.

Q. Where a hold is attacked by sweat does it attack one wing or both wings? A. I should think

that sweat in the hold of a vessel would attack both sides and attack the whole cargo.

Q. Was there anything in the appearance of the rice to indicate to you whether the damage was sweat or sea water or anything else? A. Yes; the indications were that it was salt water, because it was all on that side of the wing, that wing of the ship; the mats they had there were
1070 stuck right fast to the ribs of the vessel.

Q. Would that have been the case if it had been sweat damage? A. I shouldn't think so.

Q. Were the uppermost tiers next to the between decks damaged? A. I didn't see the uppermost tiers, sir.

Q. Were the highest tiers that you did see damaged? A. As high as I could see them—No, I didn't see those at all—I merely saw along the ribs of the vessel.

1071 Q. You don't know whether the upper tiers on the sides of the vessel were damaged or not? A. Not the upper tiers I couldn't see, because I didn't go down into the hold of the ship. On steamers they don't allow anybody to go down into the hold of the ship.

Q. Did you try to go down in the *Folmina* or do you simply speak from general knowledge? A. No, sir, I didn't try to go down into the *Folmina*.

Q. You speak of the general practice of seamen? A. No, I merely tried to go down in another ves-
1072 sel and they nearly knocked my brains out and I never went down to a steamer again.

Q. How was the separation made between the bags that were the most damaged and the others? Was it done by yourself or by your employees or was it done by these surveyors? A. No, sir; when they went to the store they were all sorted out by the employees of the warehouse and our own employees went over there and separated them before they went in the warehouse.

Q. Do you remember how many of the badly damaged bags there were? A. I should judge there were about between 900 and 1,000, I am not sure which; I am not prepared to be definite about it.

Q. Did you have anything to do with the taking of samples of rice and bagging to be tested? A. I have taken quite a number of samples; I don't know who they were for. I brought them over to the office.

Q. Who were they given to? A. Brought over to the office in Wall Street.

Q. Did you have anything to do with the taking of samples by or for Putnam, Kissam & Koehler? A. That I couldn't say what they did with the samples after they were brought over here; they were brought to the office—what was done with them I don't know.

Q. By the office you mean your office? A. Yes, sir; 98 Wall Street. My place is over in Brooklyn, I am stationed there.

CROSS-EXAMINED by Mr. Kirlin:

Q. You were present at the hearing in court, were you not? A. I was in court, sir, at the time.

Q. Had you had any talk with Mr. Brown about this case before you were in court there? A. I have met Mr. Brown before ; yes, sir.

Q. You were not a witness at the trial, I believe? A. I wasn't called. sir.

Q. Have you ever had any other case in your recollection of damage to rice from Japan? A. Yes, sir, we have had some damage cases from Japan.

Q. How many importations have you had from Japan—full cargoes I mean? A. We never had a full cargo.

Q. Never had one before? A. Never had a full

cargo, no, sir there is always something in between, always some other kind of goods besides rice. We had one vessel, I think the *Derrigo*, that is the only vessel that I remember of.

Q. This entire hold was filled with rice, wasn't it? A. I think it was.

Q. Have you ever had cargoes or consignments that have been heated from the far East? A. We
1078 have had cargoes, yes sir.

Q. You have had cargoes that have been sweated, have you? A. I don't know what you call it, whether you call it sweated or whether you call it heated.

Q. It is both the same thing in effect, isn't it, sweating and heating? A. We have had several I think that have been heated.

Q. Isn't heating and sweating the same thing? A. No, sir.

1079 Q. What is the difference? A. Heating is done with bad ventilation; sweating is done probably through the rice not being properly cured or something, I don't know anything about that.

Q. What did you mean by saying that you thought sweat would attack the whole cargo if there was sweat? A. I don't remember saying that.

Q. When you were asked whether this damage on one side could have been caused by sweat, didn't you say that you should have thought if it
1080 was sweat it would have attacked the whole cargo? A. Sweat would mean the heat of the vessel and it would naturally damage the sides and the tops and the bottom, etc.; but I don't think that sweat would go all the way through the cargo.

Q. Wouldn't that depend on where the heat came from, whether the heat came from the heart of the cargo or not? A. If the heat came from the steam-pipes that is one question; if the heat came from the rice itself—which I don't think it could come from ——

Q. Then what? A. I don't think it would heat it all the way through.

Q. You have expressed an opinion about the character of the damage, but you haven't said yet what you understood to be the signs of sea water damage. A. A man can easily enough tell sea water damage from any other damage.

Q. I don't know whether he can or not. A. He can tell whether the whole of one wing is all dam- 1082
aged by salt water or whether it is drippings or whether it is heat.

Q. You say so but I don't know whether it is so or not. A. Probably you have never seen it; probably you have never experienced it.

Q. What I want to know is what are the indications that a certain damage is sea water instead of something else? A. Sea water means that the water gets in there and cakes the rice and heats it; there is more or less heat, and then when the 1083
water strikes that rice it heats the rice and causes a steam to rise from it—that and the atmosphere of the vessel.

Q. And that condenses and wets the rice, does it? A. It don't wet the rice because the rice is all wet; it causes the caking and fomentation.

Q. Does it wet other rice—the condensation of the vapor? A. It would naturally.

Q. Does heat in rice cause vapor to collect in the hold? A. When it gets wet.

Q. Dampness makes heat? A. Yes. 1084

Q. And heat makes more dampness? A. Yes, sir; and dampness makes heat.

Q. Do you base your opinion that this was sea water damage on the location of it in the ship or on something else? A. On my personal observation, on seeing it.

Q. You still don't answer that question. Is it on account of the place where the damage was or on account of the appearance of the rice? A. On

account of the place where the rice was and the water it came in contact with. I don't know whether that answers your question or not.

Q. You didn't go down yourself, you said? A. No, but I could see from the side of the deck—the hold of the vessel.

Q. Did you see any water? A. No, sir, I didn't see the water, but I could see that the rice was
1086 wet, all the bags damaged, discolored.

Q. You could see that from up above, could you? A. I could see that, yes, sir, from the deck.

Q. Whereabouts was the damage that you saw? A. It was on the wing of the vessel.

Q. Which side? A. Going down it was on the left hand side. I don't know whether she was head on or stern on.

Q. Was it the side next to the dock or the off side? A. No, sir, it was off the dock.

1087 Q. The off side? A. Yes, sir.

Q. How much of a place in the hold did you see damage in? A. I could see probably 25 or 30 feet, just looking down the hold you could see 25 or 30 feet where the bags were all damaged, all along that side.

Q. How far inboard did it come? A. How far inside? The only thing that I saw was right along where the stanchions were.

Q. Just next to the battens? Yes.

1088 Q. You didn't ask anybody's permission to go below, did you? A. No, sir.

Q. Did you make any investigation as to how water could have got in there? A. No, sir; I don't think it was part of my business to do that.

Q. You asked no question about it of anybody? A. No, sir; I merely told them that that was damaged cargo, that is all.

UNITED STATES DISTRICT COURT, 1089

EASTERN DISTRICT OF NEW YORK.

GUSTAV JAHN *et al*,
Libelants,

AGAINST 1090

THE STEAMSHIP "FOLMINA,"
Claimant.

Depositions of Garrett W. Carst, Leendert Everts, Klass De Boer, and William Van Eyken, taken on behalf of claimant, pursuant to notice, before a notary public, at the office of Messrs. 1091
Convers & Kirlin, No. 5 Beekman Street, New York, July 26, 29, 30 and August 1 and 7, 1901, May 9, 1902.

New York, July 26, 1901.
3 o'clock P. M.

Present—MESSRS. CONVERS & KIRLIN (by Mr. Kirlin) for claimant.
MESSRS. BUTLER, NOTMAN, JOLINE & MYNDERSE (by Mr. Brown) for 1092
libelants.

It is stipulated that the testimony may be taken by a stenographer, his fees to be taxable in lieu of notary's fees; signing, certification and filing waived; a copy of the depositions to be served on proctors for libelants.

MR. BROWN: Before you examine the witness I should like to request, in view

1093 of no answer having been filed, that a statement of the defences be made on the part of the ship.

Mr. Kirlin: We do not admit that the damage was caused by sea water. We shall allege that it was caused by heating and sweating.

1094

Garret W. Carst, called on behalf of claimant, being duly sworn, testifies as follows:

Direct Examination by Mr. Kirlin:

Q. Were you the chief officer of the *Folmina* on the recent voyage from Japan? A. Yes.

Q. How long have you been an officer on steam
1095 vessels? A. I guess about three years on steam vessels; a little over.

Q. Are you a native of Holland? A. Yes.

Q. This is a Dutch ship? A. Yes.

Q. What kind of a certificate have you? A. Chief mate's.

Q. On this voyage from Japan to New York did you see the cargo stowed? A. Yes.

Q. In what hold was the rice? A. No. 3 lower hold.

1096 Q. Was there any rice in the between deck of No. 3? A. Yes, in the after part of the between deck.

Q. Is there any bulkhead between the No. 3 and No 4 between deck? A. Yes.

Q. What kind of bulkhead is it? A. Iron.

Q. In the between deck? A. Yes.

Q. What kind of bulkhead is there in the lower hold between No. 3 and No. 4? A. All iron, too; all iron.

Q. Does that extend up to the between deck? A. Yes.

Q. Was there any rice in the No. 3 between deck, do you say? A. Yes, in the after part.

Q. In the after part? A. Yes.

Q. What in No. 4 between deck? A. Tea; all tea.

Q. How was this rice stowed in the lower hold? A. In good condition.

Q. Tell us how it was stowed. Describe the stowage. In the first place, about the dunnage, was there dunnage there? A. Yes, there was dunnage on the bottom.

Q. How was that dunnage arranged? A. First there were planks alongships, and then across it, and then mats on top.

Q. How high did that make the dunnage in the bottom? A. About 4 inches, I think.

Q. Is there a wooden floor underneath that dunnage? A. Yes.

Q. And I suppose a ballast tank down under the floor? A. Yes, below the wooden floor.

Q. Are there bilges on both sides of the ballast tank? A. Yes.

Q. How was the cargo protected at the sides? A. There was bamboo on the sides, and mats.

Q. How was this bamboo placed, with reference to the cargo battens on the sides? A. It was all crossed over like that way on the sides (Witness indicating), and mats.

Q. How would you describe that? A. All that way. (Witness indicating bamboo poles placed in a slanting direction forward, crossed by bamboo poles placed in a slanting direction pointing aft.)

Q. How close together were these bamboo poles? A. About 3 inches, I guess.

Q. Was there a similar arrangement of poles on the bulkheads? A. The bulkheads were just the same; all bamboo.

Q. Arranged in the same way? A. Yes.

Q. Now, there are stringer plates on the sides of the hold, are there not? A. Yes.

Q. How far do they project out into the hold? About how wide are those stringer plates? A. About 2 feet, I guess, broad.

Q. Two feet from the ship's side? A. Yes, inside.

Q. How wide are the beams, would you say, the vertical beams—the frames? A. Between 4 and 5 feet. It makes a little difference. The lowest one is about 3 feet, and the top one a little more. From 3 to 4 feet.

Q. What is it that is 3 to 4 feet? A. The distance of the stringers.

Q. The distance between the stringers? A. Yes.

Q. You mean up-and-down distance? A. Yes.

Q. How many of these stringers are there? A. 3 in the lower hold.

Q. What I meant to ask you was, how far is it from the ship's side out to the outer edge of the stringer? A. About 2 feet.

Q. How far is it from the ship's side out to the edge of the vertical frames that go up and down? A. 9 inches—8 or 9 inches.

Q. (Diagram shown witness.) Look at this little sketch that I show you and state whether that shows the construction and arrangement of those stringers? A. Yes. There is altogether about 2 feet; and this is 9 inches from here to here. (Witness indicating.)

Q. Does this show how these stringers are made? A. Yes.

Q. Does that show the way they are built? A. Yes.

Q. And the arrangement of them in the hold? A. Yes.

Diagram marked claimants Exhibit 1 for ident., July 26, 1901.

Q. Was the cargo stowed on top of these stringer beams? A. Yes.

1100 Q. How were those dunnaged or protected, if at all? A. The stringer plates were covered up with wood first, and then mats afterwards

Q. What kind of wood? A. With planks.

Q. These stringer beams are a sort of scuppers according to this picture. Is that so? Is that the way they are built—sort of troughs? A. I don't understand that.

Q. Where was the wood put? A. The wood was put inside, just so like that it comes—

1111 Q. Tell us in words, as the stenographer has to take it down. A. I can't tell it in English, but in Holland I could tell it.

Q. Tell us near as you can. We will understand what you mean. How high was the wood? (Exhibit 1 shown witness.) A. The wood was just so high as here—as those irons. (witness indicating the top of the angle irons on the stringers.)

Q. So that it made a level surface across the top of the stringer beams? Is that what you mean?

1112 A. Yes. It was thick planks, about 3 inches thick, that you put inside—shifting boards that went along the stringer plate.

Q. What was done to protect the cargo that was outside of the beams ... There was a plank about an inch, I guess, inside.

Q. A plank put outside of the stringer plate? A. Yes, outside. Afterwards we covered it up with mats all around.

Q. Was all of No. 3 lower hold filled with rice? A. Yes.

1113

Q. When did you take this cargo on board? A. I guess it was the first of February; I don't know exactly the day.

Q. Early in February, was it? A. Yes.

Q. And when did you deliver it in New York? A. We started to discharge the cargo the 9th or 10th of May.

Q. The 10th of May? A. Yes.

1114

Q. It was in the ship about 3 months, then? A. Yes.

Q. When you discharged the cargo in New York what condition was it in? A. It looked first in good condition. The first day we discharged the cargo it was all in good condition.

Q. Then what did you find after that? A. The day we started in the lower hold, the first moment we started, it was all right; but then afterwards we came to the wings, and there was some bales was spotted a little.

1115

Q. You mean bags? A. Bags, yes.

Q. There were no bales there, were there? A. No; it was bags.

Q. Can you tell, by reference to this plan, exhibit 1, what part of the wings it was that had damage in it, or spotting, as you call it? A. First here there were some bales were spotted. (Witness indicating above the upper beam.) But at the time we started here there was more damage here. (Witness indicating between the first and second stringers.)

1116

Q. How was it between the second and third stringers? A. There was some bales was damaged some, but not so much.

Q. How were the bags in the bottom? A. The bags in the bottom were all right.

Q. How were the bags on the top? A. That was all right, too.

1117 Garret W. Carst.

Q. How was the cargo in the middle of the hold? A. That was all right.

Q. Were the bags that were spotted or damp the bags that were nearest the cargo battens? A. Yes, Just one tier of bags alongside.

Q. The battens? A Yes.

Q. How far in? How many rows did it go in?

1118 A. It was different. Some, two; some, three; it was a little different. Here was the most—two and three bags. (Witness indicating between the first and second stringers.)

Q. Now, you have told us where the spotted bags were with reference to their vertical position in the hold. Tell me what part of the hold it was fore and aft in which you found those bags? A. There was the most in the middle of the hatch—the middle of the hold.

1119 Q. The middle of the hold? A. Yes.

Q. Fore and aft? A. Yes.

Q. That is, midway fore and aft? A. Yes.

Q. Is the hatch in the middle of the hold? A. Yes.

Q. Where were these spotted bags with reference to the hatchway? Were they forward of the hatchway, or aft of the hatchway, or opposite the hatchway? A. On the port side it was a little the fore part of the hatchway, but on the starboard

1120 side it was most right in the middle of the hold.

Q. In what condition was the cargo in the extreme forward end of the hold on the sides? A. It was all right.

Q. How about the extreme after end? A. All right, too. Just the wings.

Q. What kind of a deck was this between deck? A. Iron deck.

Q. Do you know whether that is water tight? A. Yes.

What kind of a deck was the upper deck? A. Iron.

Q. Is that water tight? A. Yes.

Q. And the ship's side is steel, I suppose? A. Yes, steel.

Q. What was the condition of the side? A. It looked all right.

Q. Now, during this voyage had there been any leak in this hold? A. No. 1122

Q. Had there been any water in it? A. No.

Q. What was the condition of the cargo in the between deck No. 3? A. It was all in good condition.

Q. Was there any damage there? A. No.

Q. Was there any way that you knew of in which water could have got into that hold to cause damage at the place that you say you saw those spotted bags? A. I don't know.

Q. What connections were there between the 1123 deck and the lower No. 3 hold? A. There are two pipes in the fore part of the hold.

Q. Where do they run from? A. One from the deck and one from the between deck.

Q. What is the pipe that runs from the deck? A. It was in connection with No. 3 tank—air pipe.

Q. Air pipe? A. Yes.

Q. That is from the upper deck, is it? A. Yes.

Q. Has that any cover on top? A. Yes.

Q. What kind of a cover? A. Copper. 1124

Q. Cap? A. Yes. You can screw it up.

Q. Copper cap? A. Yes.

Q. Screws on? A. Yes.

Q. Was that on? A. Yes.

Q. What was the condition of that pipe? A. That pipe from the between deck to the lower hold—if there was some water in the between deck, it runs right through to the bilges.

Q. You are talking about the between deck pipe now? A. Yes.

Q. But I have not finished asking you about this air pipe. What condition was that air pipe in? A. In good condition.

Q. Any leak or break in it? A. No. We tried.

Q. You tried that, did you? A. Yes.

Q. When? A. The time we were here.

1126 Q. After you finished with the cargo, do you mean? A. Yes.

Q. And who tried it? A. One of the surveyors, I guess; I don't know who it was.

MR. BROWN: Did you try it yourself?

WITNESS: Yes.

Q. And you say there was no leak in it A. Yes.

Q. That is the pipe from the upper deck? A.

1127 Yes.

Q. And was that cap in good condition? A. Yes.

Q. Now, about this pipe in the between decks, that you say is a scupper pipe? A. A leaden pipe.

Q. What is the purpose of that pipe? A. If there is water in the between decks, then it can run into the bilges.

Q. It runs right down to the bilges? A. Yes.

1128 Q. Was there any leak in that pipe? A. No.

Q. Any break in it? A. No.

Q. Now, was there any water in the between decks during the voyage? A. No.

Q. If there had been any in the between decks during that voyage where would it have run? A. It would have run through that pipe and down in the bilges.

Q. Was that pipe clear? A. Yes.

Q. Now, there are ventilators, I suppose, in the deck? A. Two ventilators, yes—three ventilators.

Q. Which side are they? A. Two on the fore part of the hold, and one on the after part.

Q. They are fitted on the upper deck? A. Yes.

Q. And I suppose the inside pipe, that goes down into the lower hold? A. Yes.

Q. What condition were the ventilators in? A. All in good condition.

Q. Any leaks around them? A. No.

Q. Have you examined these things since you 1130
have been in New York? A. No. There was no damage around the ventilators. The cargo around the ventilators was all in good condition.

Q. How old a ship is this? A. Two years; a little over two and a half.

Q. Were you on the ship in New York before you went away on this voyage? A. Yes.

Q. Was the ship surveyed in dry dock then? A. Yes.

Q. By whom? A. They had it surveyed in dry 1131
dock.

Q. Lloyd's surveyor? A. I think so; yes, Lloyd's surveyor.

Q. Did you have any water ballast in the tanks on the voyage? A. No.

Q. Had there ever been any leak in the ballast tanks since you have been in the ship? A. No.

Q. Have you gone voyages in the ship when the holds were empty? A. Yes.

Q. And tanks full? A. Yes. 1132

Q. Were there any leaks? A. No.

Q. Did you keep any track of the soundings on the voyage? A. Yes, every morning.

Q. Who made the soundings? A. The carpenter.

Q. Where is he? A. He is not on board now; he left the ship.

Q. When? A. As soon as we came in here.

Q. At New York? A. Yes.

1133 Garret W. Carst.

Q. What have you been doing here in New York since the 13th of May—what has the ship been doing? A. All different business.

Q. What has kept the ship here since the 13th of May? A. The collision.

Q. You had a collision? A. Yes.

Q. In port here? A. Yes.

Q. And you have been repairing the damage?

1134 A. Yes.

Q. You say the carpenter made the soundings Do you know that? A. Yes.

Q. How do you know it A. He tells me every morning. He puts it on a paper every morning.

Q. Which of you puts it on paper? A. He puts it on paper and sends it to me.

Q. And where did you put it? A. I put it in the book.

1135 Mr. Brown: I move to strike out the testimony as hearsay.

Q. What book did you put it in? A. In a small book.

Mr. Brown: I move to strike out the testimony of the carpenter as hearsay.

Q. Was any water reported to you during the voyage as being in the bilges? A. No.

1136 Q. What soundings were reported to you? A. 2 or 3 inches.

Mr. Brown moves to strike out the answer on same grounds.

Q. Was any more water that that reported to you at all during the voyage? A. No.

Mr. Brown moves to strike out the answer on same grounds..

Q. Was it a part of the carpenter's duty to report these soundings to you? A. Yes.

Q. Did you see the carpenter make the soundings? A. Yes.

Q. Now, what in your opinion was it that caused these spots, or this dampness, to the bags that you saw?

1137

Objected to unless the grounds of the opinion are shown.

1138

A. I guess it is the sweating and heating down in the hold.

Q. Was there any way, as far as you know, or as far as you can think of, that it could have been damaged by sea water? A. No.

Q. What do you say of the quality of the stowage of this rice? A. How it was stowed?

Q. Yes. A. I think it was stowed all right—good condition.

1139

Q. Now, was there artificial ventilation provided in the cargo? A. Yes.

Q. How was that arranged? A. There were first two tiers on the bottom two bags of rice; and then there was longships ventilation; and then across to the wings.

Q. And how many of these longships ventilators were there? A. There was one on each side of the tunnel.

Q. What size was that? A. I guess about 9 inches wide.

1140

Q. What were those made of? A. Wood; planks.

Q. Boards? A. Boards, yes.

Q. How were they built? A. Two boards were standing up, and then small laths on top of it.

Q. Cross pieces? A. Yes.

Q. So it made a sort of open trough? A. Yes.

Q. That went fore and aft, did it? A. Yes.

Q. The whole length of the hold? A. Yes.

Q. And how many athwarthship ventilators were there? A. There were six or seven.

Q. On each side? A. On each side of the tunnel.

Q. Where did those lead to? A. To the longships ventilator, and to the midships—right to the tunnel, and right to the wings; in connection
1142 with the longships ventilator.

Q. How many more tiers of rice were there before there was another series of those ventilators? A. I think there were four.

Q. How many series of those ventilators were there in the lower hold—how many rows of them? A. Each four tiers, there was another ventilation.

Q. Were there any vertical ventilators? A. Yes. There were four. In each corner of the hatch, one.

1143 Q. Did they connect with the ones below? A. Yes; with the longships ventilator below.

Q. And how far up did they come in the hatch? A. Right to the hatch—right on top; just below the hatches.

Q. You mean the covers, I suppose? A. Yes; just below the covers.

Q. During the voyage did you have the hatches off at all? A. Sometimes. If it was fine weather we had the hatches off for ventilation.

1144 Q. Were the permanent ventilators kept open too? A. Yes, if it was fine weather.

Q. How much of the time did you have the hatches open for ventilation? A. Well, I don't know. You can see it in the log book. As soon as it was fine weather we opened the hatches for ventilation.

Q. Did you keep them open during fine weather? A. Yes, in the day time; not in the night time.

Q. Did you have some tea in No. 3 hold? A. In the between deck, yes.

Q. What condition was that in? A. That was all in good condition.

Q. Any damage to it at all? A.No.

Q. In what condition was the matting in the between deck? A. All in good condition.

Q. Was this cargo in the between-decks stowed in the same way as the cargo below? A. Yes. 1141

Q. How many feet was it down below the between deck before you came to the damage? A. There was no damage in midships. It was just in the wings.

Q. Was it damaged all the way up to the between-decks on the wings? A. But not so much below and on top. Just in the middle of the lower hold. There were some bags were a little spotted, but not much.

Q. Were the bags immediately under the be- 1147 tween-decks damaged? A. No, not in the between-decks.

Q. Underneath the between decks? A. Yes, in the lower hold.

Q. How far down in the lower hold did you go before you came to any damage? A. He makes first a hole in front of the hatch, and then he works to the wings; he goes six feet down in the lower hold before we start in the wings; and then he goes to the wings; and as soon as they came 1148 there they found some bags were spotted a little on top.

Q. On top? A. Yes, in the wings.

MR. BROWN: You say the spotting was on top of the bags? Is that what you mean?

WITNESS: Yes, in the wings; not below the deck; just in the wings.

MR. BROWN: The upper parts of the bags were spotted? Is that right?

WITNESS: No, not on top.

Q. But the sides? A. Yes.

Q. But the sides of the top tiers? Is that what you mean? A. Yes.

Q. Did you do any sounding of the holds yourself during the voyage? A. No; but I always was there together with the carpenter.

Q. With him when he was sounding? A. Yes, every morning.

1150 Q. Did you see the mark on the sounding rod? A. Yes.

Q. How much water did you see marked on the sounding rod in No. 3 hold at any time? A. Between 2 and 3 inches. A few buckets, that is all.

Q. After the cargo was all discharged in New York did you clean out the bilges? A. Yes, we cleaned out the bilges; and I guess we got five buckets of water. That was all.

Q. You told us that they put bamboo poles up
1151 against the battens of the ship's side? A. Yes.

Q. Were the bags of rice stowed up against the bamboo poles? A. No. There were mats between.

Q. Regular Japanese mats—Chinese mats? A. Yes.

Q. What condition were they in? A. The mats were a little dampy and wet too.

Q. In what condition were the sides of the ship? A. They were wet.

1152 Q. What made that?

Objected to as a conclusion.

A. The sweating and damp, I guess.

Q. Have you examined the ship's sides and the decks within the last few days? A. Yes. This morning I examined it again with Lloyd's surveyor.

Q. Were you able to find anything —— A. Nothing.

1153

Q. In the way of leaks anywhere? A. No, nothing.

Q. Was there any difference in the condition of the bags in the starboard wing from the condition of the bags in the port wing? A. There was a little more damage on the starboard side than on the port side.

Q. In unloading the cargo were the wet and dry bags both put out together? A. No. The 1154
first day they put it out together. There was some spotted bags, but they mixed them on the lighter. But the day afterwards they separated the wet bags—the damaged bags; and then the last day they put them all below in the lighter—below the deck.

MR. BROWN: Put what below the deck? The wet or dry?

WITNESS: The wet bags.

1155

Q. Below the deck? A. Yes, inside the lighter.

Q. Where did they put the dry bags? A. They put the dry bags on top of the deck.

Q. Did any water run out of these bags? A. No.

Q. Were they wet or —— A. No; dampy.

Q. What was the condition of the bags themselves? A. There was a few of them they made holes in with the hooks; but there was no broken bags.

1156

Q. The bags did not burst? A. No.

Q. Is the log in your handwriting? A. Yes.

Q. (Three log books shown witness.) Are these the logs of the voyage? A. Yes.

Q. Are they all in your handwriting? A. Yes.

Q. When do you make these entries? A. The last of the twenty-four hours.

Q. Do you make the entry for each day on each day? A. Yes.

1157 Garret W. Carst.

Q. This is all in Dutch, is it? A. Yes.
Q. Are the entries all correct? A. Yes.
Q. All true? A. Yes.
Q. Does it tell everything that went on from day to day? A. Yes.

Log books offered in evidence, and marked claimant's exhibits 2, 3 and 4, July 26, 1901.

1158

Q. What kind of weather did you have during the voyage? A. Different. Most of it we had good weather. Sometimes it got a little rough.
Q. Have you made a note in your log of the weather that you had from day to day? A. Yes
Q. Is that all a correct account of it? A. Yes.
Q. Did you have water on deck at all? A. Sometimes.

1159 Q. Did the ship suffer any damage? Was any damage done by the sea? A. I don't think so. No, no damage.
Q. Are you going away to Holland tomorrow? A. Yes.
Q. On what vessel? A. The *Amsterdam*.

Cross Examination by Mr. Brown:

Q. How long have you been chief mate of the *Folmina*? A. About 2 years.

1160 Q. Ever since she was new? A. No. She made one trip before I came on board.
Q. Have you received your discharge from the ship now? A. Yes.
Q. Have you any engagement for another vessel? A. I think I will be captain myself now.
Q. Have you any appointment in any other vessel? A. Appointment?
Q. Have you been appointed for any other vessel to hold any other position, either captain, or

first officer, or second officer, or any other position? A. I think captain. I don't know it yet.

Q. Are you going back to Holland at the request of anybody? A. I go back to Rotterdam.

Q. Are you going back at the request of anybody? A. I got orders from the company to go to Rotterdam.

Q. Are you still in the pay of the company? A. No, not during the trip; I don't know. 1162

Q. Has your pay stopped? A. I think so.

Q. Haven't you been paid off? A. Yes, I have been paid off.

Q. And you don't know whether you are going to get any other position or not? A. No, not yet.

Q. Are there vertical frames next inside the plating of the ship—on the side of the ship? A. I don't know what you mean.

Q. Do you know what the frames of the ship are that run up and down? A. Yes, I know. 1163

Q. Did you have those in No. 3 hold inside of the plating—those frames? A. Yes.

Q. How far apart are they? A. About one foot.

Q. One foot apart? A. I think so; I don't know it.

Q. Was the dunnage laid against the frames? A. Yes.

Q. What kind of dunnage came next against the frames? A. Planks. There were planks on the 1164 frames.

Q. Are there permanent planks against the frames? A. Yes.

Q. Those planks are a part of the ship, are they? They have been there all the time? A. Yes.

Q. And the dunnage was placed against those planks? A. Yes.

Q. Do those planks fit tight against each other,

or are there spaces between? A. No, there is 6 inches room between the planks.

Q. And how wide are the planks? A. The planks are 7 inches.

Q. They run horizontally fore and aft? A. Yes.

Q. And what did you put against those planks for the purpose of dunnaging the cargo? A. Bamboo.

1166 Q. And mats over the bamboo? A. Yes.

Q. Then inside of these frames you had three horizontal stringer plates? Is that right? A. Yes.

Q. And you put the planks and mats on top of the stringer plates? A. Yes.

Q. And stowed cargo between them? Is that right? A. Yes.

Q. These stringer plates form a sort of gully, don't they, where water can lie? A. Yes.

1167 Q. In what way was that gully filled on the voyage? Did you put a plank in it? A. Put shifting boards in it.

Q. Of what dimensions? A. About 3 inches thick.

Q. Three inches thick, and how wide. A. Filled it right up.

Q. How wide the shifting boards you put into those gullies? A. The shifting boards are 10 inches—12 inches; I don't know exactly.

1168 Q. What did you put on top of the shifting boards? A. Mats.

Q. How many pipes altogether lead through No. 3 hold? A. 3 on each side.

Q. Tell us what these 6 pipes were? A. There were two sounding pipes for the hold in the after part, one on each side; there were two pipes belonged to No. 3 tank—air pipes; and there were two pipes in the between deck to the bilges.

Q. Did all six of these pipes pass through No. 3

hold close to the wings? A. Close to the wings, yes.

Q. And the aftermost set, one on the port side and one on the starboard side, were for the purpose of sounding the bilges from the main deck? Is that right? A. Yes.

Q. What was the location of the air pipes—what you call the air pipes that led into the tanks? A. When we fill up the tanks we have to open the air pipes.

Q. Where are those pipes located as between fore and aft? Are they in the middle of the hold, or forward, or aft? A. No; on the fore part of the hold, in the corner.

Q. And they lead from the tank to the main deck? A. Yes.

Q. And on the main deck they are covered with a copper cap? A. Copper cap, yes; screwed.

Q. There is one of those on each side, port and starboard? A. Yes.

Q. And where is the third set of pipes? A. On the fore part, too, close to the air pipe; one on each side of the frame; one on the fore part and one on the after part of the frame.

Q. What is the purpose of those pipes? A. If there is water in the between decks it goes to the bilges.

Q. They are lead scupper pipes, aren't they? A. Lead pipes, yes.

Q. How far from the engine-room are those scupper pipes? A. 2 feet.

Q. And the air pipes are still closer to the engine-room bulkhead? A. The air pipe is on the after part. Just the frame is between the air pipe and the pipe from the between deck.

Q. Now, all of these six pipes are inside the battens, aren't they? A. Yes.

Q. Are they against the battens? A. In the inside. No.

Q. How close to the battens are they? A. 2 inches, I guess, 3 inches, inside of the battens.

Q. Are they cased in with wooden casing? A. Yes, from the between deck it is cased in, the lead pipe; but the other not.

Q. How large are these lead scupper pipes from
1174 the between decks to the bilges? A. I don't know. About an inch or an inch and a half.

Q. That is, an inch in diameter? A. Yes, an inch or an inch and a half.

Q. How large is the casing that goes around those lead pipes? A. 8 inches.

Q. All of the rice in No. 3 hold was in bags, wasn't it? A. Yes.

Q. How were those bags stowed? Was their lengthwise dimension fore and aft or athwart-
1175 ships? A. I don't know how they were stowed.

MR. KIRLIN—He does not understand that.

Q. How large are the bags? A. 3 feet long and 2 feet broad.

Q. As you stowed the bags did they point fore and aft, or did they point across the ship? A. The most fore and aft. The rest just comes out. If there was room to lay them down the other way.
1176 they take them the other way.

Q. Do you say you stowed them all fore and aft so far as you could? A. Yes.

Q. You had charge of the loading of the rice in Japan hadn't you? A. No; there was an officer had an examination in the hold before we started the cargo.

Q. Who had charge of the loading of the rice in Japan on behalf of the ship? A. Was it you or some other officer of the ship? A. I looked after the cargo, and the second mate too.

Q. This rice was all in perfect condition when it was loaded in Japan, was it not? A. Yes, the bags were all in good condition.

Q. You did not see the slightest fault in it anywhere, did you? A. No.

Q. A large quantity of it was wet when it came out at New York, was it not? A. It was damp.

Q. It was damp.—Have you ever made any examination of the decks of the vessel to see whether they were tight? A. There were no leaks in the deck. If there were leaks in the deck then there must have been damage in the between decks, and there was no damage in the between decks in any of the holds. The between decks were all in good condition, too, from forward to aft.

Q. You don't know anything about the condition of the deck except what you infer from the fact that there was no cargo damaged? Is that right? A. That is right.

Q. Do you know anything about the condition of the air pipes that lead through the No. 3 hold? A. They were all in good condition. There was an examination of the air pipes. Of every pipe that was in the lower hold there was an examination.

Q. Did you make any examination of the pipes in No. 3—the air pipes? A. Yes.

Q. How did you examine them? A. I put water in on top of them—on deck

Q. When did you do that? What day? A. I don't know what day it was.

Q. Is it in your log book? A. No. The cargo was all out. It was a long time after we discharged the cargo.

Q. It was a long time after you discharged the cargo that you made that examination? A. Yes.

Q. Three or four weeks after? A. No, not so long. I don't know how long it was; but—

Q. Do you think it was a couple of weeks after?

1177 1178 1179 1180

A. There was a surveyor with me. I don't know who it was.

Q. How do you fill up those air pipes? A. With buckets of water.

Q. Were the tanks full below? A. There was no water in the tanks.

Q. How did you prevent the water from flowing into the tanks? A. The water runs into the tank
1182 through the air pipe.

Q. When you made this examination of the air pipe was the tank full or empty? A. The tank was empty.—We never got a tank full the whole trip.

Q. Did you fill the air pipe with water? A. Yes. We fill it full, the air pipe, but it runs down into the tank.

Q. How did you put water into the air pipe? A. On top of the deck.

1183 Q. You stood on deck with buckets of water? A. Yes.

Q. And threw it down? A. Yes.

Q. Did the water go down into the tank? A. Yes, it went down into the tank.

Q. You didn't fill those air pipes full of water, did you? A. No. It runs right through the air pipe into the tank.

Q. Did you make any examination of the sounding tubes? A. Yes.

1184 Q. When did you do that? A. Every morning; the carpenter.

Q. You mean that you sounded the bilges, don't you? A. Yes, and the tanks too; everything.

Q. That was to see how much water there was there? A. Yes.

Q. But now I am asking you whether you examined those pipes to find out their condition at any time? A. We throw water in it—we threw water in it to see whether there came water through the pipe in the inside of the hold.

Q. Do you mean you poured water into the sounding pipe from above? A. The sounding pipe? I don't know what you mean. 1185

Mr. Kirlin: The pipes where you make soundings.

Q. Don't you call that the sounding pipe? A. Yes.

1166

Mr. Kirlin: Did you try those with water in New York?

(Witness): Not the sounding pipe. The sounding pipe is on the after part of the hold.

Q. You did not try the sounding pipes because they were aft? A. Yes.

Q. Did you try the lead scupper pipes that lead into the bilges? A. Yes.

Q. What did you do to those? A. Put water 1187
just the same as the other.

Q. Where did you put the water in? A. Between deck.

Q. Did you take a bucket of water to the between decks and pour it down? A. Yes.

Q. What did you find? A. Found them all in good condition; no leaking.

Q. What made you think that it was in good condition? A. No leaking.

Q. Because you did not find any water in the 1188
holds? Is that right? Is that what you mean? A. No, the pipe was not leaking. We threw water in the pipe, and it run in the hold.

Q. What became of the water you put into those scupper pipes? A. It run in the bilges.

Q. You did not stop up the scupper pipe below and fill it full of water, did you? A. No.

Q. Did you use a funnel in pouring the water into the scupper pipe? A. No. We can't use a

1189 funnel in the between deck. There is a grating on top of it.

Q. Did you just throw water into the scuppers on the side of the deck in the between decks and let it flow down into the pipe? Is that what you did? A. Yes.

Q. When did you do that? A. The same time.

Q. That was two or three weeks after the cargo
1190 had all been discharged? A. I don't know; I couldn't tell you the day.

Q. How much was your ship drawing on this voyage? A. I don't know. You can see it in the log book.

Q. What was the name of the carpenter who left the ship? A. I don't know.

Q. What did you call him? A. Carpenter.

Q. Didn't you ever hear his name? A. No. I met him on the boat, but not here; I don't know
1191 his name any more.

Q. Why did he leave? A. A few days after—

Q. Why? Was he discharged? A. Yes.

Q. How soon after your arrival in New York did you begin to discharge this rice? A. I don't know. You can see it all in the log book—the time.

Q. I am not a very good Dutch scholar, I am sorry to say. Just look at your log book and answer the question. (Log book shown witness.) A. Saturday, the 11th of May.

1192 Q. And you arrived on the 10th, and began to discharge the rice in the No. 3 hold on the 11th? Is that right? A. No. We arrived on the 9th.

Q. You arrived on the 9th. How much of it did you take out before you noticed any wet or damp bags of rice? A. I don't know how much. We discharged the between deck, and then we started in the lower hold. The 14th.

Q. When did you begin the discharge of the rice in the lower hold? A. (Witness looks in log.) It was the 13th.

Q. Had the cargo in the between decks been entirely discharged then? A. Not all. some of it.

Q. Was there anything in No. 3 between decks except tea? A. Yes; there was rice and cases of curios.

Q. What sort of hatches do you have in the between decks? A. The same as on top.

Q. The same as on the upper deck? A. Yes.

Q. With the high coamings? A. No, not so 1194
high. About a foot high.

Q. One foot high? A. Yes.

Q. Were the hatches on the between decks kept on during the voyage? A. Yes.

Q. Or were they taken off when the hatches were taken off? A. No. They were all on, except the four corner hatches were a little off for the ventilators.

Q. Could you get down in the between decks on the voyage, or was that stowed full of cargo? A. 1195
No; that was full of cargo.

Q. Was the cargo stowed on top of the hatchway leading into No. 3 hold? A. Yes.

Q. In loading the rice in Japan did you go alongside a dock or wharf? A. No; laid at anchor.

Q. Everything was taken on board from lighters, then? A. Yes.

Q. You finished loading your rice in No. 3 hold before you loaded anything into the between decks 1196
above? A. Yes. We filled up the lower hold altogether before w started in the between decks.

Q. And put on the hatch? A. Yes.

Q. Before you started in the between decks? A. Yes.

Q. How long was it after you had finished loading the rice in the lower hold before you began to load anything in the between decks? A. (Witness look in log.) It takes us three days for the whole cargo of rice.

Q. You mean in the lower hold? A. Yes.

Q. Now, after those three days, and you had finished your cargo of rice in the lower hold, how long were you lying there waiting for your tea and your other cargo in the between decks to come on board? A. No, we loaded tea at the same time in the between deck.

1198 Q. Were you loading your between deck cargo at the same time you were loading your rice in the lower hold? A. Yes.

Q. Did you start loading it on the same day you started loading rice into the lower hold? A. No. Sometimes we waited for a lighter, and we took other cargo between those times.

Q. Doesn't your log book show what day you started loading rice in No. 3, and what day you started loading tea in your between decks above? A. No.

1199 Q. You think you began both at the same time, do you? A. Sometimes we had to wait for a lighter or something else, and then we started with another lighter that lay alongside.

Q. What is the last cargo you carried before this voyage in the between decks of No. 3? A. General cargo.

Q. And what was the last cargo you carried in No. 3 hold before this voyage? A. General cargo too.

1200 Q. Hadn't you been carrying grain on your ship? A. Not so long as I am on board.

Q. You never had any cargo of grain while you were on board? A. No.

board the cargo ? A. No.

Q. Did you wash out your between decks in Japan before loading your between-decks cargo? A. No. The hold was all clean. We were loading general cargo here for Japan and China.

you did not wash out your between decks? A. No.

Q. And after you discharged that general cargo

Q. You say you began discharging cargo from No. 3 hold in New York on the 14th of May? Is that right? A. No. The 11th we discharged cargo. We came in on the 9th and we started the 11th.

Q. (Log show witness.) Just look at that. A. (Witness looks in log.) We started the 11th in No. 3 hold.

Q. How many days were you discharging the 2102
rice from No. 3 hold? A. (Witness looks in log.) Friday afternoon the cargo was discharged, the 17th.

Q. Then were you discharging the rice from the lower hold of No. 3 from the 11th until the 17th? A. Yes.

Q. Which day did you first discover the wet bags of rice? A. The 14th.

Q. Had you been discharging for three days before you discovered any wet rice at all? A. Yes; 1203
not only with rice; we took all the cargo out of the between decks before we started in the lower hold.

Q. The between decks were entirely empty before you started the lower hold? A. Yes.

Q. Did you wash the between decks at all in New York? A. No.

Q. When did you finish discharging the between decks? A. I don't know. Monday, some hour.

Q. Did you finish on the 11th? A. Monday afternoon, I think, the 13th.

Q. Then you did not begin on the lower hold 1204
until after the 13th, did you? A. The 13th, in the afternoon, we started in the lower hold.

Q. Then you did not start on the rice in the lower hold on the 11th, as you testified before, did you? A. No.

Q. Now you started the rice in the lower hold on the 13th in the afternoon. When was it you discovered the first wet bags? A. The 14th in the afternoon—No wet bags; dampy bags.

1205 Garret W. Carst.

Q. Damp bags? A. Yes.

Q. Which side of the ship were those damp bags on? A. Each side.

Q. Did you find the damp bags just as soon on the one side of the ship as on the other? A. Yes.

Q. How far out toward the wings had you got before you discovered any damp bags? A. Two or three bags.

1206 Q. You were within two or three rows of the wings before you discovered any damp bags? Is that right? A. There were some places it was two bales from the side, and in the middle of the hold there were some places that it was three bags.

Q. Three bags from the side? A. Yes.

Q. At that time you had taken away all the bags that were directy under the between decks out as far as that distance, hadn't you?—You don't undersand that? A. No.

1207 Q. When you opened the hatches you took out bags enough to make a hole 6 feet deep first didn't you? A. Yes, in the hatch. After that we worked toward the wings.

Q. Then you started working toward the wings? A. Yes.

Q. Did you work toward the port and toward the starboard wing both equally rapidly? A. Yes.

Q. Just as fast to one side as to the other? A. Yes.

1208 Q. You were opening a passage way right across the ship, were you? Is that right? A. Yes.

Q. Was it on the same level? Did you go across on the same level? A. Yes. We take so much out that the men can work standing up below the between deck.

Q. Until you got within two or three bags of the side you did not find any damp bags at all? A. No, not in the middle of the ship.

Q. You did not find any damp bags until you got within two or three bags of the sides? Isn't

that right? A. Yes; some spotted bags just below the between deck the first day—the 13th or whatever it was.

Q. But you did not find any damp bags until you got within two or three bags of the side? Is that right? Is that correct? A. In the wings. I don't know what you mean.

Q. You know what a damp bag is? A. Yes. But the damp bags were only in the wings; not 1210 in the middle of the hatch.

Q. And only within two or three bags of the very skin of the vessel (isn't that right) on the side? A. I told you just below the between-decks on the upper part there were some bags—in the wings—close in the wings—that were a little dampy.

Q. Now, when you got over to the wings within two or three bags of the sides of the ship —— A. There was not two or three bags on top; but only 1211 one in some places were a little dampy.

Q. The upper bags, then, were wet only one bag? A. One bag was dampy; it was not wet.

Q. Were damp, then. Only one damp from the side of the ship? Is that right? A. Yes; on top.

Q. On top? A. On top, in the wings.

Q. And as you went down they were damp further from the side of the ship? A. No. Only two or three bags in the middle of the lower hold.

Q. When you say "middle of the lower hold," 1212 you mean half way from the top to the bottom? Is that what you mean? A. Yes, that is what I mean; between the first and second stringer plate.

Q. What part of each bag did you find to be damp? A. Close to the wings.

Q. Was only a part of each bag damp, or was the whole bag damp? A. I don't examine all the bags.

Q. You didn't examine the bags? A. No.

Q. Did you see the bags as they were being

taken out of their position in the wings? A. Yes, I saw them. Not all. I was sometimes down there.

Q. You saw some damp bags being taken out? A. Yes.

Q. Were those bags damp on top, or damp on the sides, or damp altogether? A. Damp on the side. Just on the wing— on the wing-side; some
1214 a little more, some a little less.

Q. How far forward did the damp bags extend toward the engine-room bulkhead? A. They were most in the middle of the hatch—the middle of the hold.

Q. Did they extend all the way up to the engine-room bulkhead? A. No.

Q. How close to the tea did they come? A. I didn't examine how close it was, but I saw the most damage was in the middle of the hatch.

1215 Q. You don't know how close the damp bags came to the engine-room bulkhead? Is that right? A. No, I don't know that.

Q. Weren't you taking any notice when the bags were discharged from near the engine-room bulkhead? A. On each end of the hold the bags were all in good order. I told you it was most in the middle of the hatch.

Q. How close to the engine-room bulkhead did you find any damp bags? A. There was not damp
1216 bags in the bulkhead.

Q. I say how close to the bulkhead did you find any damp bags? I don't know; I didn't examine it.

Q. Did you find any within 6 feet? A. I don't know.

Q. You can't express any opinion at all about that? Is that right? A. No, it is not right. I told you on each end of the hold the bags were in good condition.

Q. That is not what I asked you. A. That is what I tell.

Q. Can't you tell how far you had to go from the engine-room bulkhead to find any damp bags? A. No.

Q. For how many lengths of bags fore and aft did you find them damp? A. I was not there all the time.

Q. You don't know that? A. No.

Q. You have said that you found only about one bag nearest the side wet in the upper tiers, and as you went down and got to the first and second stringer plates you found two or three bags from the side wet? A. No.

Q. And still further down not so much? A. No.

Q. Isn't that what you said? A. Some places there was one, and other places there was two and three, in the middle of the hatch; and further down on the bottom the rice was all in good order.

Q. The place where there were two or three from the wings that were wet was between the first and second stringers? Is that not right? A. There were no bags wet.

Q. Damp, we will say. Isn't that right? Mate, if you don't understand my question say you don't understand, because we want to go ahead and finish. A. I don't know what you mean.

Q. You don't know what I mean? A. No.

Q. You have described somewhat in detail where you found the moist bags with respect to the side of the ship. Now I ask you whether that description applies to the port side of the ship or to the starboard side of the ship? A. It was on both sides.

Question repeated.—In telling us about these two or three bags from the sides of the ship weren't you telling us about the starboard side of

1221 the ship and not the port side of the ship? A. The damage was on both sides.

Q. It was not damaged on both sides, was it? A. Sure. Well, it was a little worse on the starboard side; but on the port side it was damaged too.

Q. And when you say a little more damage was on the starboard side than on the port side, tell me a little more particularly what you mean. Do
1222 you mean there was twice as many damp bags on the starboard side than on the port, or three times as many, or ten times as many? A. I didn't count them.

Q. I want your best opinion on that subject. A. I tell you it was a little more damage on the starboard side than on the port side, but I don't know how much.

Q. Isn't it a fact that you found ten times as many moist bags on the starboard side as on the
1223 port side? A. I don't know.

Q. You wouldn't say whether that was true or false? A. No, I can't tell it. I know there was more on the starboard side, but I don't know how much.

Q. Isn't it a fact that there was twenty times as many moist bags on the starboard side as on the port side? A. I don't know; I can't tell it.

Q. There may have been or may not have been? Is that it? A. I don't know.

1224 Q. How many ventilators did you have in the No. 3 hold leading from the hold to the main deck? A. 6; 4 on each corner of the hatch, and 2 regular ventilators. Of the lower hold?

Q. Yes. Is that what you meant? A. Yes, that is what I meant.

Q. You say you have 6 ventilators leading from the upper deck to No. 3 hold? A. Yes; one on each corner of the hatch, and two regular ventilators on the upper deck.

MR. KIRLIN: Stationary ventilators.

Q. Are not all these stationary, permanent ventilators? A. Yes.

Q. Are not you talking about the temporary ventilators that you made out of wood for the cargo? A. I don't know what you mean.

Q. What were these 6 ventilators made of? Wood or iron? A. Of wood.

Q. Those were not permanent in the ship, were they? A. In the lower hold we made them of wood altogether.

Q. Those were not permanent all the time in the ship, were they? Those wooden ventilators did not stay always in the ship? A. No.

Q. Now, I want to know about the ventilators that you have always in the ship. How many of them are leading to the lower hold No. 3? A. Two.

Q. And are they iron? A. Yes.

Q. Where are they placed? A. Right through the deck.

Q. Where do they enter the lower hold? A. The iron ventilator is going to the between deck, and is fixed up on the between deck.

Q. Doesn't it pass through the between decks into the lower hold? A. No.

Q. Isn't there a permanent ventilator in the lower hold? A. There is an iron ventilator in the between deck, but there is no iron ventilators in the lower hold.

Q. It passes through the between decks? A. It passes through the between deck.

Q. It opens into the lower hold, doesn't it? A. Yes.

Q. And there are two of those? A. Yes.

Q. Aren't there three openings through the between decks into the lower hold? A. No, there are only two. There are three ventilators on deck, but one is only for the between deck and not for the lower hold.

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Q. Where are those two ventilators that lead into the No. 3 lower hold placed? A. One on the after part, and one on the fore part; starboard side fore part, and port side after part.

Q. Do you know anything about the condition of the ventilator on the starboard side forward part? A. All in good condition.

1230 Q. Did you make any examination of it? A. Yes.

Q. When did you examine it? A. I examined it every day. There was not one damaged bale on the ventilators.

Q. Are you willing to swear positively that there were any damaged bags in the port wing of No. 3 hold? A. Any?

Q. Damaged bags in the port wing? A. Sure. There was.

Q. Was there more than one or two? A. Yes.

1231 Q. How many? A. I don't know. I didn't count them.

Q. Were there more than three or four? A. Yes.

Q. Were there more than a dozen on the port side? A. Yes.

Q. Were there more than twenty? A. Yes, there was more. I don't know how much.

Q. Will you swear there were more than a dozen bags on the port side that were damaged? A. Yes, I will.

1232 Q. How many will you swear were damaged that came from the port side? A. I didn't count them, but there was more than a dozen, I know.

Q. Who discharged the cargo in New York? A. The stevedores belonging to Barber; I don't who he was.

Q. Do you know the name of the man that had charge of it? A. No.

Q. Now, when the rice was discharged in No. 3,

isn't it a fact that you found the dunnage on these stringer plates wet? A. No.

Q. Didn't you find the mats mouldy from dampness and moisture on the stringer plates? A. Only on the bamboos the mats were dampy.

Q. The mats were damp? A. Between the stringer plates on the bamboos.

Q. Where were those mats that were damp? A. Between the stringer plates.

Q. You mean the mats that were over the bamboos on the cargo battens? A. The mats between the stringer plates. Between here. (Witness indicating between the first and second and second and third stringers.)

Q. Here also? (Counsel indicating.) A. The mats were dampy mostly between the first and second stringer plates, but a little also between the second and third.

Q. The bamboos and the mats were wet between the first and second stringers? Is that right? On the side of the ship? A. No, that is not right. They were dampy; not wet.

Q. How far did those wet or damp mats extend aft in No. 3 hold? A. I don't know.

Q. Isn't it a fact that they were wet in the vicinity from which the damp bags came out? A. There was no wet bags.

Q. Well, the moist bags. Answer the question. Isn't it a fact that they were wet in the vicinity from whch the damp bags came out?

MR. KIRLIN—Do you understand that?

(Witness.) No.

Q. The same place where you took the damp bags out was also the place where you found these wet mats? Isn't that right? A. No wet mats; dampy mats.

Q. Did you find any wet or mouldy dunnage on

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the stringer plates? A. No. The stringer plates were all in good condition, and the bags too.

Q. Did you find any wet dunnage on the stringer plates? A. No.

Q. Did you find any dump dunnage on the stringer plates? A. No.

Q. Did you find any mouldy dunnage on the stringer plates? A. No. Just exactly between
1238 the stringer plates.

Q. But you have testified that you put certain boards on top of the stringer plates, and then mats on top of them? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. Now, when you uncovered those boards and mats were they dry or moist? A. The stringers were dry.

Q. I didn't say the stringer plates. Were the boards and mats damp or moist? A. The boards
1239 and masts were dry on the stringer plates.

Q. They were dry everywhere, were they? A. Yes.

Q. Do you swear positively? A. Yes.

Q. All along those stringer plates those boards and mats were perfectly dry, were they? A. Yes.

Q. Is that right? A. Yes, that is right.

Q. Mate, you testified that the mats between the stringer plates were damp? A. Yes.

Q. That was on the starboard side of the ship, was it not? A. No, both sides.

1240 Q. Damp on the port side also? A. Yes.

Q. You have testified that you tested the air pipe and the scupper pipe. Is that right? A. Yes.

Q. Did you test them on both sides, the port side and the starboard side, also? A. The starboard side.

Q. You didn't test them on the port side, did you? A. No.

Q. Why did you not test them on the port side? A. I don't know; it was not my business.

Q. The object of testing those pipes was to find out what caused the damage, was it not? A. I think so.

Q. Who ordered you to test them? A. The surveyor.

Q. Did you only act as the assistant for the surveyor? A. I beg your pardon.

Q. Did you only make the test in the surveyor's presence? A. Yes; the surveyor told me to do it. 1242

Q. Did you make that examination while the sur veyor was present? A. Yes, sure.

Q. Did you make any examination when the surveyor was not present? A. No.

Q. What was the condition of the casing around the scupper pipe after the cargo had been taken out? A. In good condition.

Q. Was it damp or dry? A. It was dry.

Q. Was it mouldy? A. No, it was dry.

Q. Was that casing taken off? A. Yes.

Q. Were you there when it was taken off? 1243
Yes. Every piece was broken off.

Q. What was the condition of the inside of that casing? A. It was all right inside.

Q. Was it wet, damp, or dry inside? A. No, it was dry.

Q. Wasn't that casing filled up inside with loose material? A. No.

Q. Like grain, or chaff, or chips? A. A little underneath.

Q. What was that material inside the casing? 1244
A. I don't know. I didn't examine what it was.

Q. Was that damp, wet, or dry? A. It was dampy.

Q. It was mouldy, was it not? A. I don't know what "mould" is.

Q. Crumbling? A. Might be.

Q. Did you take any up in your hand and squeeze it? A. No.

Q. Isn't it a fact that it was sopping wet? A.

1245 It was dampy. I saw it afterwards, when they threw it on deck.

Q. Didn't it leave a wet spot on the deck where it was thrown? A. I don't know.

Q. You don't know whether that is true or not? A. No.

Q. And yet you say the inside of the casing that lay next to this damp material was perfectly dry?

1246 A. Yes, on top, and part below too.

Q. How was it on top? A. Just below on the corner we found that stuff, but further on top it was dry.

Q. Were you present when the casing was taken off the scupper pipe just above the middle stringer plate on the starboard side? A. What do you mean?

Question repeated. A. I can't understand.

Q. Do you know what the casing of the scupper

1247 pipe is? A. Yes, I know what it is.

Q. Do you know where the middle stringer plate is? A. Yes, I know that too.

Q. Did you see the casing taken off the scupper pipe just above the middle stringer plate? A. Yes, it was taken off all over from top to below.

Q. Did you see it when it was taken off? A. Yes. I was down in the hold.

Q. Didn't you see a large amount of dripping, loose material taken out from that casing just

1248 above the stringer plate? A. No. Below.

Q. That was below the stringer plate? A. Yes.

Q. But you saw that dripping stuff coming out, did you? A. It was not dripping; it was dampy.

Q. Do you know of any repairs that have been made to the ship in New York? A. Repairs?

Q. You have had repairs made for a collision damage, haven't you, in New York? A. Yes.

Q. Have you had any repairs made in No. 3 hold, as far as you know? A. No, not a bit.

Q. You don't know of any? A. I know not a bit, I say.

Q. You don't know of anything being done to that scupper pipe? A. No.

Q. Or to the side plating of the ship? A. No.

Q. In No. 3 hold? A. No. Nothing done on it.

Q. What experience have you had with the sweating of cargo? A. I guess it is from the heat.

Q. What experience have you had with the sweating of cargo? A. What "experience"? I don't know what it is.

Q. Have you known about sweating on any voyages before your last voyage? A. No, not in this ship. But I got it before.

Q. You have had to do with sweating in other ships, have you, before this? A. Yes. I had it before this with a cargo of coffee.

Q. Now, the sweating does not extend two or three bags in from the side of the ship, does it? A. I don't know.

Q. Have you ever known such a case of sweating? A. I don't know.

Q. You don't know of any such case of sweating, do you? A. I have had coffee, and there was a lot of damage due from damp—sweating.

Q. But the only bags that were injured from sweating were those right next the side of the ship, and those right under the deck, were they not? A. I don't understand.

Q. The only bags of coffee that were damaged from sweat were the bags next to the side of the ship or next to the deck? Isn't that right? A. No There was some in front of the hatches, and some in the wings too—just like here. Just where the damp goes through the hatches on each side on the wings.

Q. Just where the sweat will drift from the hatches, and where it will run down in the wings?

1253 Is that right? A. No. It never can run down in the hatches from the wings.

Q. Mate, in the other cases of sweating that you have known you found the sweat just below the hatchway and in the wings along the side of the ship? Isn't that right? A. This cargo of rice?

Q. No. I am not talking about this cargo of rice. I am talking about other cases of sweating.

1254 A. No. On the sides.

Q. You only found the sweating where the bags touched some metal surface (isn't that right) or came close to it? A. No, that has nothing to do with it. We are talking about rice.

Q. You don't want to tell me about the other cases of sweating you have had to do with? A. Well, it is a long time ago. It has nothing to do with this business, had it?

1255 Q. You never knew of a case of sweating, did you, except where the bags next to the side of the ship, or next to the decks, or right below the hatchway, were injured? Isn't that so? A. I don't understand.

(By consent, the captain translated the question to the witness.)

(Witness.) The cargo was only damaged on both sides.

1256 Q. Don't you understand English well enough to answer the questions? A. That is too much for me now.

Q. Did you ever know any case of sweating where two or three bags in succession from the side of the ship were all damp? A. I don't unstand the question.

Q. Do you know what "succession" means? A. No.

Q. I will change the question. Did you ever know a case of sweating where two or three bags,

one right after the other, lying next to the side of the ship, were injured? A. Well, it makes a difference how long a cargo is in the ship; the longer a cargo stays in a ship the more damage there is. 1257

Q. That is not the question. Do you know of any case of sweating where the third bag from the side of the ship would be damp? A. I don't know. I couldn't tell.

Q. You never knew such a case, did you? A. I don't know. I tell you the longer the cargo is in the ship the more the damage. 1258

Q. Now wait.—I want to know of any such case, and you say you don't know? Isn't that right?—Do you know of any case where the second or third bag away from the side of the ship has been damp? A. No, I don't know.

Q. Why is it you have testified that you guess this cargo was injured by sweat? A. I think so; that it was sweat. I don't know, but I think it was sweat. 1259

Q. Why do you think it was sweat, when you never knew another cargo injured as this one was with sweat? A. Because there was no leakage whatever.

Q. Then your reason is that you could not discover any leak, and so you thought possibly it may have been sweat? Is that it? A. I never found a leak. So I expected the sweat.

1260

RE-DIRECT:

Q. Was there any surveyor on board when you were loading this rice in Japan? A. Sometimes.

Q. Were all these pipes that lead from the upper deck down to the lower hold No. 3 covered with the same kind of copper caps? A. Yes.

Q. And were all those caps on during the voyage? A. Yes.

Q. Did any water go down through any of those pipes during the voyage? A. No, never.

Q. Have you examined the decks in New York to see whether there were any leaks in them? A. No. Well, we were cleaning the deck sometimes every day, and sometimes two or three times a week, and we never found a leak on the upper deck.

Q. How do you clean the decks? A. With water.

1262 Q. Does it go through? A. No.

Q. Does the water go through the deck? A. No, never. We never found any leak.

Q. You said there were two stationary ventilators? A. Yes.

Q. In the No. 3 hold? A. Yes. There are three, but one is only for the between-deck.

Q. Now, how far inboard from the side of the ship are those ventilators? A. I think it is about 10 feet from the sides—10 or 12 feet; just one

2163 length from the side of the hatch—straight with the hatch.

Q. You spoke of having had a cargo of coffee once in which there was some sweat? A. Yes.

Q. How many bags did the sweat reach? A. It was just like here. Some one, some two, and in some places three, on the sides and just around the hatch. Down from the hatch was a little in the coffee.

Q. How long did you have that coffee in your

1264 ship? A. From Java.

Q. From Java? A. About three months. From Java to Amsterdam.

Q. In what ship was that? A. Sailing ship?

Q. Sailing ship? A. Yes.

Q. What was the name of the ship? A. The *Jeremiah*.

Q. Who was your captain at that time? A. Wilhelm von Duyn.

Q. Whose ship was that? A. Mr. Hendricks'.

Q. Did she hail from Holland? A. Yes. She belongs to Amsterdam.

Leendert Everts. 1265

MR. BROWN: I request that this witness be produced for further cross-examination after I have had an opportunity to have the logs translated into English, as I am unable to read Dutch.

The taking of depositions adjourned by consent to Monday, July 29, 1901, at 12 o'clock M.

1266

NEW YORK, July 29, 1901.
12 o'clock M.

Adjourned by consent to 2 o'clock P. M. same day.

NEW YORK, July 29, 1901.
2 o'clock P. M. 1267

Met pursuant to adjournment.

Present—MR. KIRLIN; MR. BROWN.

LEENDERT EVERTS, called on behalf of claimant, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr Kirlin:

Q. Are you the second engineer of the *Folmina*? A. Yes. 1268

Q. How long have you been engineer on her? A. Fourteen months now.

Q. Where is your chief engineer? A. He is in Rotterdam.

Q. Did he go home immediately after you arrived here? A. Yes.

Q. Have you been aboard of her during the time the vessel has been repairing in New York? A. Yes.

1269 Q. What kind of a connection do you have for getting water out of No. 3 hold of the *Folmina*? A. We have two pipes.

Q. Two pipes? A. Yes; one on the starboard and one on the port side.

Q. What are those pipes for? A. For letting water out.

Q. Out of what? A. Out of the bilges.

1270 Q. And they lead into the engine room, do they? A. Yes.

Q. The pump is in the engine room? A. Yes.

Q. How close do these pipes go to the bottom of the bilges? A. Two valves; for each pipe a valve.

Q. The end of the pipe goes into the bilges? A. Yes.

Q. On the port side, and the same on the starboard side? A. Yes.

1271 Q. Which end of the bilge does the pipe go into —the forward end or after end— of No. 3 hold? A. The fore end of the bilge.

Q. The No. 3 hold? A. Yes. Just abaft the engine room.

Q. Is there a strainer around the mouth of the pipe—rose box? A. Yes, a square box.

Q. A strainer box? A. A square box. Yes.

Q. Is that of wire? A. Yes; cast iron.

Mr. Brown: That is on the bilge?

1272

(Witness): On the bilge, yes.

Q. Can you pump all the water out of the bilge with this pipe? A. Yes.

Q. How close can you pump to the bottom? A. At about 4 inches it sucks.

Q. That pump sucks? A. Yes.

Q. You mean at about 4 inches the water in the bottom of the bilges rests there all the time, as far as the pump is concerned? A. Yes.

Q. You can't pump it out? A. No. It is impossible.

Q. Now, on this voyage from Kobe, when you brought the rice to New York, did you have any water in the No. 3 hold? A. No.

Q. Did you pump any water out of the No. 3 hold? A. No.

Q. How many engineers were there? A. Three.

Q. How many watches do you keep in twenty- 1274
four hours? A. I take the dog watch from 1 to 5, and the day watch from 1 to 5 too.

MR. BROWN: Isn't that the dog watch?

(Witness): No. The dog watch is from 1 to 5 in the night time. After *mittag*—we call it "afternoon" in Dutch; I don't know what you call it.

MR. BROWN: After 12?

1275

(Witness): In the day time, yes.

Q. Never mind. You stand the watch from 1 to 5 twice a day? A. Yes.

Q. How do you know when there is any water in the No. 3 hold in the bilges? A. When there is any in it the mate tells me every morning. Every morning the carpenter sounds all the holds, and then the mate tells me when there is water in any holds.

Q. Did the mate do that in this vessel? A. Yes, 1276
the whole voyage.

Q. Did he tell you every morning what the soundings were? A. Yes.

Q. How much water did you have in the No. 3 hold at any time during the voyage? A. Well, about 4 inches.

Q. Did he ever report any more that that to you? A. He reported that always. If there was more water in it, he says "We have got more

water in that hold," and we pump it out. That is what he says.

Q. How much did you have at any time according to the mate's report? A. 4 inches.

Q. I asked you whether you ever had any more than 4 inches? A. On this voyage?

Q. Yes. A. Never. I am not exactly sure, but it was about 4 inches, I didn't make a note of it.

1278 Q. Was there any leak in that hold during the voyage? A. No, I don't think there was. I never was in that hold.

Q. You know what a "leak" is, don't you? A. Yes; water coming in from outside.

Q. Did that happen in that hold during the voyage.

MR. BROWN: Objected to. The witness testifies he was never in it.

1279 A. No.

Q. Did you ever pump any water out during the voyage? A. No.

Q. Was it your business to pump out the bilges? A. Yes.

Q. If there had been any water there would it have been pumped out in your watch? A. Yes, it would be always in my watch.

Q. And was any pumped out in your watch? A. No.

1280 Q. At any time during the voyage? A. No.

Q. Did you hear of any leak in the No. 3 hold? A. No; I never heard anything about that.

Q. Was there any leak in the deck of the No. 3 hold? A. I don't think so. I was not in that hold.

Q. You were around there? A. I don't remember any in that hold.

Q. But you see the deck? A. I saw the deck. The deck was all right.

MR. BROWN: Is it part of your duties to examine the condition of the deck?

Witness: No.

MR. BROWN: I object to his testifying about the condition of the deck.

Q. Do you know anything about the damage to the rice? A. No. I heard about that in the mess-room, but I can't tell you anything about that.

Q. You are going to Rotterdam now, I believe? A. Yes.

Q. Are you going to sail Saturday? A. I hope so. The captain was to send me last Saturday; but I must come here, and I couldn't go last Saturday.

Q. You stayed over to be examined here to-day? A. Yes.

Q. And are you going next Saturday? A. Yes.

CROSS-EXAMINATION by Mr. Brown:

Q. Engineer, I understand that it is the practice on your ship to pump out the bilges only once each day. Is that so? A. One time each day?.

Q. One time each day? A. In the bilges of the engine-room the whole day.

Q. You pump during the whole of the day? A. Out of the bilges in the engine-room, yes.

Q. The bilges in the engine-room? A. Yes. They pump the whole day.

Q. When are the bilges of the cargo holds pumped? A. When there is water in it we pump it out. When there is no water in it we don't pump.

Q. Is there any regular time for pumping out the bilges of the cargo holds? A. No. When there is no water in it we don't pump it.

Q. You have testified that no water was pumped out of No. 3 bilges? A. No.

Q. How do you know anything about it, since

you are only on duty eight hours in the day? A. There is nobody else would pump in the holds except I did.

Q. But you say you pump whenever there is water in there, no matter what time of day it is, don't you? Isn't that what you say? A. I say when there is pumping out of the holds I always do it. I pump the water out of the holds when
1286 there is water in it. That is my business on board the ship.

Q. You are second engineer, aren't you? A. Yes, I am second engineer.

Q. Does the chief engineer keep the watch? A. Yes, he keeps watch.

Q. If he found there was water in the bilges wouldn't he pump the water out in his watch? A. Out of the holds? No, I don't think so. If there was any danger in it he attends to it.

1287 Q. Is there any more reason why you pump water out of the bilges than the chief engineer? A. No; but it a little better for him that I do it than he himself does it, that is all.

Q. It is a little easier for you that the third engineer should do it? A. No; it is my business; it is my work.

Q. Do you know of the third engineer having pumped out the bilges? A. No.

Q. Is he instructed not to do so? Is that a
1288 part of the rules of the ship—that the third engineer must not pump any water out of the bilges? A. Yes; it provides that the bilges is always for the second engineer.

Q. What becomes of the water that is pumped out of the No. 3 hold? A. I didn't pump water out of it.

Q. When you do pump it out where does it go to? A. Goes to the outside.

Q. You pump it out through the side of the ship? A. Yes.

Q. Does the tube of the pump that taps the bilges in the No. 3 hold lead out through the side of the ship? A. Yes; each side, one.

Q. Directly? A. Yes.

Q. Didn't you testify that it led into the engine room? A. I don't understand you.

MR. KIRLIN: It is the overboard discharge the engine room.

Q. Does the pipe that taps the bilges in No. 3 go into the engine room at all? A. No, there is a bulkhead between it.

Q. Does that pipe pass through the bulkhead into the engine room? A. Yes.

Q. Then where does it go to from the engine room? A. To the valves from the lance pipe—from the pipe to the pump.

MR. KIRLIN: It the overboard discharge pipe, isn't it?

Witness: No; to the bottom pipe of the bilge pump. The bottom pipe of the bilge pump goes to the valves, you see. In that way. (Witness indicating.)

MR. KIRLIN: They are all discharged overboard through one pipe?

Witness: Yes.

MR. KIRLIN: And you get water from different holds by opening the valve connections with this one pipe that discharges overboard from the engine room?

Witness: Yes.

Q. When you stop pumping in No. 3 hold the water does not stop flowing until it flows out

1293 overboard through the side fo the ship? Is that right? A. Yes.

Q. Do you keep a log book? A. Yes; the chief keeps the log book, I don't keep it.

Q. Do you keep any entries for your watch? A. No.

Q. How does the chief know what to put into his log book for events in your watch? A. Well, I
1294 tell him. I come to him and I tell him,

Q. Do you keep a slate in the engine room? A. Yes, we write it up with a piece of white—

Q. Chalk? A. Yes.

Q. Do you hand that to the chief? A. Yes, I do that at the time he comes in—how many revolutions we make, that is all; and then he takes in over into the log book.

Q. When you have occasion to pump the bilges out do you enter that fact in the log book? Is
1295 that one of the things you hand in to the chief engineer to put into the log? A. Yes, sure.

Q. Does the entry show which hold you pumped out? A. No, I don't think so. I don't think that is what he says in it.

Q. When you tell him do you tell him which you pump out? A. Yes, every time.

Q. Your last voyage from Japan was a smooth voyage, was it not? A. I don't know what "smooth" is.

1296 Q. Even; not stormy. A. No; a little bit.

Q. You didn't have any storm that voyage, did you? A. No.

Q. Nothing carried away—was injured? A. No.

Q. It was a smoother voyage than usual, was it not? A. "Smoother?"

Q. Smoother; more moderate; a pleasanter voyage than usual? A. Oh, yes, it was all right.

It was pleasant. It was good weather. A little bit of wind sometimes; a little bit of sea too.

Q. Didn't you hear the captain say anything about there being a leak in No. 3 hold? A. No.

Q. Didn't he tell you there was one of the rivets loose in the side of the ship? A. No, nothing about that.

Q. Did you hear him say anything about there being a leak in the scupper pipe in No. 3 hold? 1298
A. No.—They all tried, but it was all shut; it was all right.

Q. Did you try that scupper pipe? A. No. The mates did.

Q. You were not there when they did it? A. No.

Q. Were you there when they took off the casing of that scupper pipe? A. "Casing?"

Q. Casing; that is, the boards around the scupper pipe, like that (counsel indicating). A. No, 1299
I was not there.

Q. You were not there? A. No.—When they took the wood off?

Q. Yes. A. No, I was not there.

Q. Did you see the kind of material that came out of that casing? A. No.

Q. Were you there after the casing had been taken off? A. Yes, I was there one time with a surveyor. He was looking after the things.

Q. Was not that casing wet and mouldy? A. 1300
It was dry.

Q. It was dry then? A. Yes.—That is now about a week ago.

Q. Your ship has been in dry dock since you have been here, hasn't she? A. Yes.

Q. Where was it docked? A. In Erie Basin Dry Dock.

Q. And were repairs made by the Robbins Company? A. Yes.

Q. Do you know whether they repaired any

bolts in No. 3—the side of the ship in No. 3 hold? A. No.

Q. You don't know anything about that? A. No. There was nothing to repair there. It was only in the No. 4 hold that the sternpost was taken out.

Q. You were not watching the repairs, were you? A. Oh, I was looking after it a little bit;
1302 not so much; I was working in the engine room, and I looked a little bit after the shafting there.

Q. It was no part of your duties to watch the repairing, was it? A. No.

Q. Did you see the rice in No. 3 hold before it was discharged? A. Yes, I saw it outside. I didn't pay any attention.

Q. Did you see it when it was still in the hold? A. Yes; but I didn't give any attention to it. I saw it.—And then I saw it go in.

1303 Q. Didn't you see that it was wet and mouldy? A. No, I didn't see that.

Q. Didn't you see a white mould on the bags? A. No.

Q. You didn't notice anything about it? A. No, I don't know anything about that.

Q. Do you know the carpenter on your last voyage? A. Yes.

Q. What is his name? A. That I can't tell you.

Q. What is the name of your chief engineer?
1304 A. Coenraad Freund.

Q. What is the name of your third engineer? A. I had two in that time. The third engineer at that time when the rice was on board?

Q. Yes. A. Van der Weirf.

Q. Is he here now? A. No. He has gone home.

Q. Where has he gone now? A. I think he is in Rotterdam; I don't know where he is.

Q. Do you know why the chief engineer and the third engineer have left the ship? A. They left the ship here in New York.

Q. I said why—what reason. A. What reason? They wanted to go home, that was all; they were fourteen months out.

Q. Were they discharged? A. "Discharged?"

Q. Dismissed from the employ of the steamship company? A. No. They asked for it.

Q. Do you know why the carpenter left? A. No. He must be in New York here. I don't know where he is. 1306

Q. Do you think he is in New York? A. I think so. I don't know where he is. It may be that the shipping master may know where he is. I don't know.

Q. Now, do you mean to testify that your pump was not used at all in No. 3 hold in this long voyage? A. No, never.

Q. And as far as you know, there was not a drop of water more in that bilges at the end of that voyage than there was at the beginning? Is that 1307 what you testify? A. Yes.

Q. That your ship was absolutely tight as far as that hold was concerned? A. That hold was all right. There was no water at all in it.

Q. Isn't it usual to have a little accumulation of water in the bilges of every hold on a long voyage? A. There was a little bit of water in it; 4 inches.

Q. But you had 4 inches in the bilges to start with, hadn't you? A. Yes.

Q. Didn't you have any more in it at the end 1308 of the voyage? A. No. It might be a quarter of an inch, but no more.

Q. Isn't it very unusual not to have more water in on a voyage than that? A. When it is shut up, when the needles are shut, then you can't get water in it—when the *needles* are shut then you can't get water in.

Q. What are the needles? A. The plates come around here. (Witness indicating.)

Q. You mean the side plating of the ship? A. Yes. When the sides are shut you can't get water in it.

RE-DIRECT:

Q. Engineer, is there a ballast tank in the No. 3 hold in the bottom? A. Yes.

1310 Q. Was there any water in that ballast tank at any time while the rice was on board? A. No.

RE-CROSS:

Q. Where is the ballast tank situated? Does it occupy the whole bottom of the ship except the bilges? A. Yes.

Q. That is in No. 3 hold? A. Yes.

Q. Is it in any other hold besides No. 3? A. The tank?

1311 Q. Does the ballast tank extend to any other hold besides No. 3 hold? A. No. In No. 1 you have a tank, No. 2, No. 3, and No. 4.

Q. You have a ballast tank in each of the four holds? A. Yes.

Q. Were they all empty when you started on the voyage? A. Yes, all empty.

Q. Was there any cargo in any of them as far as you know? A. I don't understand.

Q. Can those ballast tanks be used to stow car-

1312 go in? A. No. They are all shut up.

Q. Did you pump any of those ballast tanks out during the voyage? A. The fore tank.

Q. The forward tank? A. Yes.

Q. In No. 1? A. Yes. I don't know just the time of pumping it out, but I pumped out the fore tank. I know that.

Q. Did you pump out the bilges in No. 1 hold on the voyage? A. No.

Q. Did you pump out any of the bilges in this ship during that voyage? A. No. 2.

Q. How much did you pump out of No. 2? A. Not much. I don't know how much, but not much.

Q. How much water was reported to you in No. 2 when you began pumping? A. I forget that. You can ask the mate. He made a notation of it.

Q. How much water was there in No. 1 ballast tank when that was pumped out? A. That was full up.

Q. How did it get full? A. It was about three 1314
feet.

Q. When did you fill it? A. When we loaded the coals in Foochow, I suppose. I don't know whether it was Foochow; I can't tell you that.

Q. Did you take the water out? A. After that we took the water out. I don't know that sure; you had better take that out of the log book. It is all in the log book. I don't know the time for sure.

Q. Was there any leak in any of your tanks on 1315
your ship, as far as you know? A. In any of the tanks?

Q. Was there any leak in any of the tanks on that voyage? A. In No. 2 tank there was a little bit leak. We had it before, but I don't see it now —when I came on board.

Q. Where was that leak? A. I think it was on the tube.

Q. On the tube. Which tube? A. The sounding tube—the sounding pipe.

Q. How far up on the sounding pipe? A. I 1316
think so.

Q. How high up on the sounding pipe was that leak? A. No, not high up. In the bottom.

Q. In the bottom of the sounding pipe? A. Yes.

Q. Where did the water leak to? A. In the bilges.

Q. From the ballast tank into the bilges? A. Yes.

Q. Has that leak been repaired? A. No.

Q. Is it still there? A. Yes.

Q. Doesn't it still leak there? A. Yes; when the tank is full up then it is a leak.

Q. Isn't there a similar leak in No. 3? A. No, none whatever.

Q. Are you sure of that? A. Sure.

Q. When did you last test it? A. It is best to take it out of the log book. I dont know the time.

1318 Q. What is your best recollection? A. It was before we took in the coals; before Foochow.

Q. That is two voyages ago, isn't it? A. No. Before we took in the coal at Foochow on this trip.

Q. That is during this trip? A. Yes.

Q. Did you fill No. 2 ballast tank at that time? A. Yes.

Q. Was No. 2 ballast tank full at the time when you loaded this rice? A. I forget.

Q. Did you call at Foochow after leaving Ko-

1319 be? A. No, I think Foochow was before Kobe, isn't it? I forget it.

Q. Which did you take on board first, your coals or your rice? A. Coals.

Q. Was it bunker coals you referred to? A. Yes.

Q. Or cargo coals? A. No; bunker coals.

Q. And when you took the coals on board you pumped out No. 3 ballast tank? A. I don't know what time we pumped them out. It is best you

1320 take it out of the log book. I don't know that; I can't tell you for sure.

Q. Did you pump out No. 3 ballast tank in Foochow? A. I can't tell you.

Q. Is that in your log book? A. I don't know whether it is in the log book. It is best you take it out of the log book.

Q. Do you remember when it was you pumped out that No. 3 ballast tank? A. No, I don't remember that.

1321

RE-RE-DIRECT:

Q. The No. 2 hold was forward of the engine room, was it not? A. Yes.

Q. No. 3 is abaft it? A. Yes.

The taking of further depositions adjourned by consent to Tuesday, July 30, 1901, at 10.30 A. M.

1322

NEW YORK, July 30, 1901.
10.30 o'clock A. M.

The taking of depositions adjourned to 2 o'clock P. M. same day.

NEW YORK, July 30, 1901. 1323
2 o'clock P. M.

Met pursuant to adjournment.

Present—MR. KIRLIN; MR. BROWN.

KLASS DE BOER, called on behalf of claimant, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Kirlin: 1324

Q. Mr. De Boer, how long have you been an officer on steam vessels? A. A little more than a year.

Q. How long have you followed the sea? A. 11 years.

Q. How long have you been connected with the *Folmina*? A. A year; a couple of days more than a year.

1325 Q. Have you been on sailing vessels before this? A. I have.

Q. In what capacity? A. I was officer there too.

Q. Officer on sailing vessels? A. Yes.

Q. For how many years? A. I was out with a little sailing vessel for 22 months as mate—only mate. There was only one mate aboard the little
1326 ship. And I was out on a bark to India as chief officer for 16 months.

Q. In what trade were you in the sailing vessels? A. To South America and the East Indies; first to South America and then to the East Indies.

Q. What kind of cargoes did you carry? A. All kinds; general; coals.

Q. Coffee? A. No; none at all.

Q. On the *Folmina,* I believe, you were second officer? A. Yes.

1327 Q. What part of the ship do you have charge of as second officer during the loading and discharging of cargo? A. The after part.

Q. What holds? A. No. 3 and No. 4.

Q. Do you receive all cargo that comes for those two holds? Do you tally it in? A. No. I only look out for the stowage.

Q. You look out for the stowage? A. Yes.

Q. Who does the tallying? A. There comes a tallyman from the shore, if there is any. That is
1328 all I can tell about that.

Q. Who tallied this rice that you shipped at Kobe? A. I didn't see any tallyman there.

Q. Did you watch the cargo as it came aboard—this rice? A. Yes, I watched that rice.

Q. How did it come aboard? How was it brought to the ship? A. It came with lighters.

Q. What kind of lighters? A. Open lighters.

Q. How large were these lighters? A. I think there were different kinds of lighters; from 25 to 50 tons.

1329

Q. How many bags of rice would come on a lighter? A. I can't tell, because I didn't count them; and then most of the time I was down in the hold and didn't see the lighters come alongside.

Q. What kind of weather did you have? A. Cold weather.

Q. Cold weather? A. Yes. Some breeze. One day more breeze, and another one less.

1330

Q. Was there any day while you were at Kobe on which you did not load—on which lighters did not come out? A. Yes, I remember something about it—that there was one day it was snowing very much, and there was so much breeze that we could not load that day; but I can't tell truly, because it is a long time ago—half a year ago now. But I remember something of it.

Q. How was this cargro lifted out of the lighters into the vessel? A. There were some bags that were a little stained only a couple of dozen or so—

1331

and we sent them back.

Q. No.—I want to know how you lifted the bags from the lighters on board the vessel? A. We heaved them over with the steam winch; and all the time ten in a sling.

Q. Ten in a sling? A. Yes.

Q. As they came aboard were they lowered right down into the hold? A. Lowered right down into the hold. Yes.

1332

Q. Did you endeavor to watch the condition of the bags? A. Yes. I watched the condition of the bags.—I was down

Q. You said there were some stained? A. Yes, there was.

Q. What was that stain caused by? A. Some water that came on them.

Q. What did you do with those? A. I sent those bags back.

Q. Back to theh lighter? A. Yes.

Q. Now many altogether did you send back, do you think? A. I think about a couple of dozen.

Q. What was done with those you sent back, A. I don't know. They lowered them in the lighter; and I was in the hold.

Q. You sent them back to the lighter? A. Yes.

Q. Did you see anything done to any of those bags on the lighter that you sent back? Did you
1334 see them changing bags? A. Yes. One time I myself saw the fellows in the lighter put the rice out of that stained bag, and put it in a dry sack, and give it up again.

Q. Do you know whether they took back to shore any of the bags that you sent back on to the lighter? A. Yes. Some of the bags went on shore.

Q. Some of them went on shore? A. Yes.

Q. How high were these lighters out of the
1335 water? That is, how much freeboard did they have? A. When they unloaded, do you mean?

Q. Yes? A. I think about 2 or 2½ feet.

Q. How far do they come from the shore—to the ship? A. I think about 5 or 6 cables lengths.

Q. Before you began to take in any rice what was done in the way of preparation of the hold? A. We cleaned the hold out with brooms, and then we locked all—I can't tell you what I mean—we put some oakum in—

1336 Q. In the seams? A. In the seams; made it all close.

MR. BROWN: What seams is he talking about?

Q. You mean the seams of the floor? A. Yes, that is what I mean.

Q. Go on? A. And then we put dunnage in; and I was down in the hold all the time when

the men were doing that; and the surveyor came to look at it.

Q. What did you do to the bilges? A. Nothing.

Q. Was there any water in the bilges? A. No, not that I remember. A little bit, I suppose.

Q. How do you know how much there was in the bilges? A. About 3 or 4 inches, I think.

Q. How do you know? Did you see the bilges? A. Because we opened the limbers to look in 1338
there, and we saw that everything was all right. There was no dust; and no water in, only a little bit—we can't take that out.

Q. Then, I suppose, you put the limberboards back? A. Put the limberboards back, put them on again, and made everything close too.

Q. What kind of dunnage was put on the floor —on the ceiling of the bottom? A. There was first just small laths.

Q. Slats? A. Slats. I don't know what you 1339
call them.

Mr. Brown: What size?

Q. How thick? A. About 1½ inches, I think.

Mr. Brown: Square? 1½ each way?

(Witness.) Yes; 1½ inches or 2 inches, or 1¾; I can't tell exactly. And then on top of them, boards; and made it all close with boards; that 1340
was about 1inch, or 1¼, or 1½ inches thick. Then on top of them, mats.

Q. Then the cargo was put on the mats, was it? A. The cargo was put on the mats, yes.

Q. What was done with the sides of the ship? A. The sides? She had bamboo; and made the bamboo fast all with lines about an inch out one of the other.

Q. You mean tied fast? A. Yes, closed fast.

1341 Q. And then mats over the bamboo, I suppose? A. Yes, mats over the bamboos.

Q. How are the bulkheads fixed? A. The bulkheads—all bamboos too, and some mats.

Q. There are three stringer beams in that hold, aren't there? A. Yes.

Q. What was done with those? A. The stringers—they filled them up first with shifting boards
1342 and other pieces of wood (stowage wood), and on top of them, boards all around.

Q. And did you put any mats around those? A. And double mats around them.

Q. How were the bags stowed? Fore and aft, or crosswise? A. Fore and aft.

Q. Did the rice fill the lower hold all full? A. Yes, all full.

Q. And was there any rice in the between decks? A. There was about 80 to 100 tons, I
1343 think.

Q. In what part of the between deck was that? A. In the after part.

Q. The same between decks? A. The same between decks—between decks No. 3.

Q. How far forward did that rice that was in the between decks extend? A. Just the after side of the hatch.

Mr. Brown: Up to the after side of the
1344 hatch? Is that what you mean?

A. Yes.

Q. The after end, do you mean—up to the back end of the hatch? A. Yes, from the bulkhead to the after part of the hatch.

Q. Right across the ship? A. Right across. Filled it right up—that corner.

Q. What was there from the rice to the forward end of the hold in the between decks? A. There were all different kinds of cargo. There

was tea; there was curios; there was porcelain—all kinds of cargo. 1345

Q. Was the between deck quite full? A. Yes, it was.

Q. Were the between deck hatches on? A. Yes.

Q. And was cargo stowed on top of the hatches? A. Yes.

Q. And did you see what was done in the way of ventilation of the rice? A. I beg your pardon, I don't understand. 1346

Q. Did you see any ventilation put in for the rice? A. Oh, yes.

Q. How was that put in? A. Before we loaded first we put six ventilators up and down.

Q. Up and down? A. Yes. One in every corner—

Q. Of the hatch? A. Of the hatch. And the other two underneath the ventilators which came from deck. 1347

Q. What kind of ventilators were those that were up and down? A. How do you mean?

Q. How were they made? How were they built? A. There were two planks, and they made slats across about 12 to 14 inches.

Q. Apart? A. Apart.

Mr. Brown: Those slats were the same stuff you put on the floor—1½ by 1½? 1348

(Witness.) No. I think they were a little thicker.

Q. Those were the six ventilators that were vertical? A. They were vertical. Yes.

Q. Were there any horizontal ventilators? A. Yes. Before we put that in we put two tiers of bags in.

Q. Then what did they put in? A. Then they put in ventilators—two fore and aft ventilators.

Q. Made the same way? A. Made in the same

1349 way, yes; and then on every side of the tunnel, one.

Q. On each side of the tunnel? A. One, yes. And then those two fore and aft ventilators go right in those vertical ventilators—across them. And then afterwards they put those cross ventilators on. Of the cross ventilators, there were seven of them. Three of those cross ventilators
1350 passed those vertical ventilators, and then the other four were between the vertical ventilators.

Q. They went crosswise, those seven? A. Yes.

Q. Were there seven on each side? A. Seven on each side.

Q. You said they put those seven down after they had two tiers of rice in? A. Yes.

Q. Then how many more tiers of rice did they put in? A. There was about 19 tiers altogether, I think.

1351 Q. Do you mean up and down? A. Yes, up and down.

Q. 19 bags high? A. Yes.

Q. And how many rows of ventilators were there in those 19 bags? A. Three.

Q. Three crosswise? A. Yes, three crosswise, and three fore and aft.

Q. And three fore and aft? A. Yes.

Q. You said the first set of ventilators was on top of two tiers of bags? A. Yes.

1352 Q. How many tiers of bags of rice did they put on before they put in any more ventilators? A. About six tiers of rice on. And then on the ninth tier was ventilation again just the same. Six ventilators came in the third tier. Because we put two tiers of rice in, and then put the ventilators that came in the third tier. Then we put five tiers again. And then in the ninth tier it was ventilated again like the third tier.

Q. Then after that? A. After that we put five

tiers on again—No, I made a mistake. Excuse me a moment, because I have to think of that. We put four tiers on. And then in the fourteenth tier we put ventilators like in the third and in the ninth tier.

Q. Were each of these three tiers of ventilators just alike? A. Yes, just the same. But there is this difference in them: The first ventilation was underneath the top of the after tunnel; but afterwards the rice came higher; so in the ninth tier the ventilation was on top of the tunnel; and then put a third fore-and-aft ventilator in, which goes in the middle of the ship from one bulkhead to the other. 1354

Q. Now, when you got up to the between deck was anything put on top of the bags? A. Mats.

Q. How many rows? A. I can't tell, but it was all covered over.

Q. What kind of stevedores were engaged in stowing this cargo in Kobe? A. Well, I don't know, but the foreman was a Chinaman. 1355

Mr. Brown—The foreman was a Chinaman, do you say?

(Witness.) I suppose so.

Mr. Brown—What makes you think so? Did you see him? Did he look like a Chinaman to you? Is that what you mean? 1356

(Witness.) I have to think about that, because we take such a lot of fellows. In every place we have a lot of stevedores and coolies come from shore, and it is very difficult for me to say it out at once.—Yes, it was a Chinaman.

Q. And what were the laborers—all the men who lifted the bags? A. Coolies—Japanese.

Q. Japanese coolies? A. Yes.

1357 Q. Now, when you got to New York did you overlook the unloading of that hold? A. Yes, I did.

Q. Did you see the cargo that came out of the between decks? A. Yes, I did.

Q. What condition was that in? A. Very good. There was no damage there at all that I could see.

1358 Q. What was the condition of the cargo in the lower No. 3? A. There was damage on it.

Q. Tell us how far you worked down before you came to any damage? A. Well, the first day that we discharged the cargo there came a little damage in the afternoon, some stained bags. But nobody of the receivers or the stevedores—nobody—thought about it, and took them away in the lighter. Nobody thought about it. The next day there came some more damage on the sides.

1359 Q. Which side? A. Both sides.

Q. How far down was that from the between deck? A. About 6 or 7 feet, I think. It was just between the first and second stringer from the top. That is about 6 or 7 feet, I suppose.

Q. How far did that extend in from the side? A. There was some damage on the second tier; but the most damage was on the first tier. The second tier had very little damage.

Q. And how far down did that condition go?

1360 A. After the second stringer the damage was less, but there was some damage right down to the bottom—there was some damage; and then on the bottom every thing was dry.

Q. What was the condition of the dunnage and mats on the bottom? A. It was dry.

Q. How far fore and aft did this damage extend? A. Just across the hatch.

Q. Across the hatch? A. Across the hatch. The most damage ——

Q. What was the condition of the bags in the

after part? A. The after part of the hold, you mean?

Q. Yes. A. It was dry.

Q. How was the forward part? A. The forward part was dry too.

Q. Was there any difference in the extent of the damage on the different sides? A. Yes; there was a little more damage on the starboard side than on the port side. There was more damage on the starboard side.

Q. Was there very much difference in the amount of damage on the different sides? A. Well, how do you mean? In the damage itself, or in the bags?

Q. Well, in the appearance of it. Were there many more on one side that appeared to be damaged than there were on the other side? A. I didn't count them.

Q. As you looked at it how did it appear to you? A. Well, I think there were about three bags damaged on the starboard side to two on the port side.

Q. What was the real condition of these bags that were damaged? A. Some bags were dark.

Q. Were any of them wet? A. Damp.

Q. Was there any water oozing out of them? A. No. I didn't see water at all there, sir.

Q. Were there any leaks in this No. 3 hold anywhere?

Objected to unless the witness knows.

A. I never saw leaks.

Q. Have you looked for them? A. I have.

Q. Was there any water in the hold during the voyage?

Objected to unless the witness knows.

A. No.

Q. How do you know that? A. How I know that?

Q. Yes. A. Because the carpenter has to sound every morning the bilge.

Q. Did you see him do it? A. I was on the bridge. I saw him from off the bridge that he was doing it.

Q. Was it in your watch that the carpenter made his soundings? A. Yes.

Q. You saw him do it? A. Yes.

Q. Did you see what he found—what he reported? A. Yes.

MR. BROWN: Which do you mean?—Question objected to as ambiguous.

Q. After the cargo was all discharged in New York did you lift the limber boards again? A. Yes.

Q. What was the condition of the limbers in New York? I couldn't see any difference than in Kobe before we loaded the cargo.

Q. Was there any accumulation of water in the limbers? A. There was a little water in just as before—as before.

Q. How much? A. 3 or 4 or 5 inches.

Q. Is that an unusual thing? A. I beg your pardon?

Q. Is that an unusual quantity? How much water do you always have in the bilges? A. We had 3 or 4 or 5 inches. There were different soundings. Because when the ship is rolling a little we may have got a little more, and next day, just when the carpenter sounds, it rolls over to the other side, and you have got less water; because the ship is not lying still, and there is a difference in the soundings.

Q. After the cargo was all unloaded and you lifted the limbers in New York, was there any

more water in the limbers than there was in Kobe? A. No, I couldn't say that.

Q. What do you mean by that? A. I couldn't see more water here than in Kobe. I couldn't see a difference in the amount of the water.

Q. What was this damp condition of the bags on the port and on the starboard side that you have described caused by, in your opinion? A. I don't know what you mean. 1370

Q. What made these bags damp on the port and starboard side? What was it that made the bags damp? A. I can't tell.

Q. What is your judgment about it? What do you think it was? A. I think it was sweat.

Q. Was there any way in which those bags could have been damaged by sea water in the ship?

MR. BROWN: Objected to. The witness ought to tell the means, if there are any. He ought to state specifically, instead of stating his conclusion. 1371

A. No.

Q. Have there been surveyors on board examining the ship here at New York? A. Yes. I saw some gentlemen go down in the hold, but I cannot tell if they were surveyors.

Q. Did you see this gentleman who was sitting here, Captain Salter, on board the ship? A. Yes. 1372

Q. Was he making an examination? A. I can't tell, because I was not in the hold when this gentleman was there.

Q. Did he find any leaks?

Objected to.

A. Well, the gentleman didn't tell me that he found any leaks. He would not tell it to me, because I am only the second officer.

1373 Klass De Boer.

Q. You saw him looking there, did you? A. Yes. That is what I have seen.

Q. The vessel has been repairing collision damage in New York since this cargo was delivered, has she not? A. I don't understand what you mean.

Q. There was a collision? A. There was a collision.

1374 Q. In New York? A. Yes.

Q. And you have been repairing the damage caused by the collision? A. The ship is repaired.

Q. And how long has she been repairing here? A. It was 8 days ago.

Q. You finished repairing 8 days ago? A. Yes.

Q. When did you begin repairing? A. I can't tell. I don't know the date of it.

Q. About three months ago? A. No, it is not three months yet.

1375 Q. When did you discharge and deliver your cargo? A. I can't tell. I don't know the dates.

Q. It was in May, was it not? A. It was in May, yes.

Q. Two months ago? A. That is two months ago.

Q. Have any repairs been done in the No. 3 hold?

Objected to unless the witness has some knowledge on the subject.

1376

A. No.

Q. Have you been on board all the time? A. Yes.

Q. Is the ship in the same condition now in the No. 3 hold that it was in when this rice was on board?

Objected to.

A. Yes.

Q. Was there any water in these stringers—the fore and aft stringers? A. No.

Q. During the voyage were these ventilators that led up to the deck kept open A. Yes.

Q. Do you recollect how long the voyage was? A. You mean the time that the rice was in the ship?

Q. Yes. A. I suppose 3 1/2 or 4 months—no, I beg your pardon; it was more. It is about 4 or 1378
4 1/2 months, I think.

Q. You said that four of these ventilators came up the No. 3 hatch? A. Yes.

Q. Did they come up above the covers or to the covers? A. The covers were on top.

Q. On top of them? A. Yes. But all the time that it was nice we opened the hatches, and then the wind-sails we put on the top of one of them to put the wind in, if there was high wind.

Q. When the weather was bad what did you do 1379
with the hatch covers? A. We put the hatches on.

Q. Did you have to put the hatches on during the voyage? A. When it was bad weather, you mean?

Q. Was it bad weather? A. Yes, we had it. In the time that we had the rice in the ship we had bad weather in the China Sea, and when we came from Moji to Shanghai.

Q. Did you cover the hatches then? A. Yes.

Q. And how about in the Atlantic? A. In the 1380
Atlantic we had bad weather too—in the North Atlantic.

Q. Did you cover the hatches then? A. Yes, and took the ventilators off.

Q. Did you have to take the permanent ventilators off during the voyage? A. Yes.

Q. How many times? A. I can't remember that. Two or three times.

Q. When you took the permanent ventilators off what did you do with the holes in the deck? A.

Oh, we covered them up with wood covers, and then put sail covers on top, and then bound around with some line.

Q. That is battening down, is it? Do you call that battening down? A. I don't know what you call it in English.

Q. At any rate, you took the ventilators off and closed the holes? A. And closed the holes, yes.

1382 Q. What ventilation was there during the time when you had to have the hatches down and the ventilators off and the holes stopped? A. There was no ventilation at all.

Q. Are you going to sail with the ship when she leaves here? A. Yes.

Q. You are a native of Holland? A. Yes.

Cross-Examination by Mr. Brown:

1383 Q. How many voyages have you been on this ship? A. I came on board this ship at Hamburg, and then I went from Hamburg to America, Port Royal and Charleston; from there to New York; from there out to China and Japan, and back to here. That is all.

Q. This voyage from Japan to New York was the only one upon which the vessel carried any rice while you were on board? A. Yes.

Q. Have you ever been on any other vessel that carried cargoes of rice? A. No.

1384 Q. Have you had any experience with this sweating of cargo in the ship's hold? A. "Experience?" I can't tell what "experience" is.

Q. Has there been any sweat on the ships that you have been in before the present one? A. No, not that I know of.

Q. You never saw sweat in the ship's hold on any ship that you have been on? A. I saw sweat on a ship, yes, but it was cold; it was an iron car-

go; in iron ships there is always sweating in the winter time; that is what I think.

Q. Have you ever been on any other iron ship than the *Folmina*? A. Yes.

Q. On what ship have you been? A. The *Amicitia.*

Q. How long were you on that vessel? A. 16 months.

Q. Was any cargo damaged by sweat? A. No. 1386

Q. How did the sweat show itself? A. Oh, I didn't see any sweat on that vessel.

Q. Have you ever been on any vessel where there was sweat? A. Yes.

Q. What vessel? A. It was a Dutch schooner —an iron schooner. Her name was the *Tasman.*

Q. Was any cargo damaged on that vessel? A. No cargo. I saw the sweat when we loaded. It was in Hamburg. It was in the winter time, and every morning when we hove up the hatches the 1387 sweat was hanging on the deck.

Q. Did it drip down from the beams that supported the deck? A. The sweat was hanging on the deck, yes.

Q. On the underside of the deck. A. On top.

Q. On the upper side of the deck? A. The upper side of the deck, yes.

Q. Then it was not in the hold? A. No. You don't understand me. I mean on the underside of the deck.

Q. You have to look up to see it? A. Yes. On 1388 the sides the most.

MR. KIRLIN: On the sides of the ship, do you mean?

WITNESS: When you look up to the deck, this is the deck (witness indicating) and that is the side of the ship; and just there on the side it was always hanging the most. (Witness indicates the under side of the deck.) There was some sweat on the sides, but mostly on the deck.

1389 Q. Have you ever been on a ship where the cargo was damaged by sweat? A. No. This is the first that I know.

Q. Why is it that you have expressed your opinion that this cargo—or rice—was injured by sweat on the *Folmina*? A. Yes. I can't find another explanation for it.

1390 Q. You don't know any explanation at all for it, do you? A. No.

Q. You have no particular reason for thinking it was sweat, have you, since you have had no experience with sweat? A. I have no experience, but it is my opinion.

Q. How did you first get that opinion? A. Well, I thought so. When there was coming in salt water in that ship, then the salt water must go right down to the bottom, and then the bags on the bottom must be wet.

1391 Q. Suppose the salt water had come into that ship on the sides, but had not come in any large enough quantities to soak down to the bottom, wouldn't you have found just the same amount of damage that you did find? Do you understand the question? A. No, not good.

Question repeated. A. No, I do not believe so.

Q. What difference do you think there would have been? A. When there comes only a little salt water in, it would have to run down to the

1392 bottom just as if it came in a large quantity.

Q. You think, however little water there would have been there, it would have any way run down to the bottom? A. Yes. Any salt water that came would have to run down to the bottom.

Q. And that is the only reason you have for thinking that the damage was probably sweat? A. No, that is the reason.

Q. You have no other reason, have you? A. No.

1393

Q. What cargo did you carry from Hamburg to Port Royal and Charleston? A. Salt.

Q. Salt? A. Yes.

Q. And from there to Japan? A. From there we came to New York.

Q. From there to New York. And did you carry any cargo? A. No.

Q. In ballast? A. In ballast.

Q And then you went from New York to 1394
Japan? A. Yes.

Q. With a general cargo? A. Yes.

Q. Case goods? A. Case goods, yes, and iron, and all kinds of cargo.

Q. What kind of cargo did you have in No. 3 hold from New York to Japan? A. There was some iron, some cases, some safes; all different kinds of cargo were in the holds—in all the holds.

Q. Did you examine the bilges upon arrival in Japan when you discharged your general car- 1395
go? A. Yes.

Q. What was the state of the bilges? A. In No. 3 hatch, you mean.

Q. Yes, in No. 3 hold. A. In No. 3 hold the bilges were all right. There was no dust in them; only a little water, about 3 or 4 inches.

Q. That is when you reached Japan? A. Yes. That was when the cargo was out, you mean?

Q. Is it a part of your duty to take the draft of the ship? A. No. 1396

Q. Did you touch at any ports from Kobe, where you loaded the rice, until you arrived in New York. A. Yes. We came to Shanghai, Foochow, Hong Kong, Singapore, and passed through the Suez Canal, and Algiers, and then to New York; that is all.

Q. Where was the cargo for No. 3 between decks taken on board? A. We took the rice on board at Kobe; and there was a little cargo came on board at Yokohama.

1397 Q. Was that after you left Kobe? A. No; before. And then we filled the top in Shanghai and Singapore—I believe, but I can't tell exactly. Yes, in Shanghai and Singapore.

Q. After you discharged your general cargo in Japan did you wash the between decks in No. 3? A. No.

Q. Don't you ever wash the decks? A. The
1398 decks? No.

Q. You let them stay dirty do you? A. We clean them out with brooms.

Q. You sweep them dry, do you, and you don't use any water at all on the decks? A. No.

Q. Have the between decks never been cleaned with water as far as you know? A. Yes, that voyage when we came from Charleston to New York.

Q. And never since then? A. No.

Q. What is the kind of hatch that you have in
1399 the between decks? A. The hatch is just the same as the hatch on the main deck—not so high.

Q. How high are the coamings in the between decks? A. On the side 1½ feet, and the middle 2 or 2½ feet; I can't tell; you will have to take the measurement of it.

Q. Is that hatch covered with tarpaulins? A. No.

Q. Is it water tight? A. The between deck hatch, you mean? No. When you put tarpaulins
1400 on—when we put tarpaulins on—it is water tight. Then it is just as the top ones.

Q. You do not put tarpaulins on the between deck hatch, do you? A. No.

Q. What did you carry on your last voyage from Japan in No. 4 hold? A. A lot of tea.

Q. Was it all tea? A. No. There was tin ore, and a lot of tea, and curios, I think that is all—and fire crackers.

Q. Did you carry any rice on the ship any-

where else except in No. 3 hold and between decks? A. No.

Q. How many permanent ventilators did you have in No. 5 hold? A. Two.

Q. Located where? A. One on the starboard, and one on the port side.

Q. Forward or aft? A. The port side is aft, and the starboard side is forward.

1401

Q. How close to the wings—how close to the side of the ship? A. Just on the side of the hatch.

1402

Q. Close to the hatch? A. Yes. It is not on the hatch, but just about the same distance from the boards as the hatch—from the sides.

Q. Do you mean it is half way from the side of the hatch to the side of the ship? A. I can't tell. We had wood ventilators in the corners.

MR. KIRLIN: He wants to know how far those permanent iron ventilators were from the ship's side.

1403

Q. (Paper shown witness.) That is a pretty rough drawing. Where are those ventilators?—Here is the hatch, here is the hold, and here is the bow. (Counsel indicating.)—Where are the scupper pipes in No. 3 hold? Underneath what place? Where do they go down? A. I don't know what it is.

1404

MR. KIRLIN: The drain pipes.

(witness.) The drain pipes?

Q. Yes, from the between decks to the bilges.

Witness marks same on diagram.

Q. Those run from the between decks down to the bilges? A. Yes.

Q. Where do you have the air tube for the bal-

1405 last tank? A. It comes out here. (Witness indicating.)

Q. One side or both sides? A. Both sides.

Q. Where is the sounding pipe for the bilges—sounding tube? A. Here. (Witness marks same.)

Diagram offered in evidence, and marked libelants' exhibit A, July 30, 1901.

1406 Q. In addition to the permanent iron ventilators, you had 6 temporary wooden ventilators, did you, that went up and down? A. 6 ventilators, yes.

Q. 2 of those went up to the iron ventilators and communicated with them? A. Yes.

Q. That was at the between decks—just under the between decks? A. Wood ventilators?

Q. Yes. Those two wooden ventilators com-
1407 municated with the iron ventilators just under the between decks? A. I don't understand you. The iron ventilation goes down to the between deck.

Q. The wood ventilation goes further down? A. The wood ventilation goes down to the bottom.

Q. And up as high as the bottom of the iron ventilators? A. On top of the wood ventilators were the iron ventilators.

Q. How high did the other four wooden ventilators run? A. Up to the hatches.

1408 Q. What hatches? A. Upper-deck hatches.

Q. That is, the main deck hatches? A. Yes.

Q. They run up through the between decks? A. Yes, through the between decks.

Q. Could you put the between-deck hatch-covers on when you had those ventilators in place? A. Yes, we could put them on. But those in the corners, we have to take pieces of wood and we fill the room up.

Mr. Kirlin: For the ventilators go through the hatch.

WITNESS: The ventilators go through the hatch, and we make it all close.

Q. I understood you to say that you had three sets of horizontal ventilators which communicated with the vertical ventilators? A. Yes.

Q. And these three sets were at different elevations or hights in the hold of the ship? A. Yes.

Q. How many horizontal ventilators were there in each set? A. Do you mean crosships or fore and aft? 1410

Q. No; on both. A. On both? In the first set there were nine. The lowest set consisted of 9 horizontal ventilators; 2 fore and aft, and 7 athwartships. The other 2 sets consisted of 10 horizontal ventilators each, 3 fore and aft, and 7 athwartships.

Q. Did your vertical ventilators go straight up and down, or did they incline? A. No, straight up and down. 1411

Q. Did the horizontal ventilators run from the vertical ventilators over toward the wing of the ship? A. Yes, close.

Q. How close to the wing of the ship did the horizontal ventilators come? A. To the mats.

Q. Were the horizontal ventilators constructed of two boards with slats on the other two sides? A. Just like the vertical ventilators.

Q. Was it not like this? (Counsel indicating.) These are boards, and there were slats between, like that? (Counsel indicating.) Is that the way it was? A. Yes. 1412

MR. KIRLIN: Was it like a ladder on the sides?

WITNESS: Like a ladder on the sides.

Q. On one of the two sides? A. On the two sides; and the other two sides were closed.

Q. In the position in which you have placed

these horizontal ventilators were the slats on the two sides or above and below? A. I have to think a little about that; I can't remember. So far as I remember, they were standing up.

Q. The boards were standing up on the edge? A. And the top was closed, and underneath was closed.

MR. KIRLIN: Slats on the sides?

1414 WITNESS: Yes, so far as I remember. But I can't tell truly because I forget it.

Q. Do you mean that the two boards of which this horizontal ventilator as composed, each of them lay horizontally? A. I can't tell. I can't think if they were horizontal or vertical; I believe they were lying horizontal.

Q. Then the slats would point up and down? A. Yes.

1415 Q. You think that was the way it was? A. Yes, that is what I think, but I can't tell truly.

Q. What would be the dimensions of these ventilators in the cross section? Do you understand the question? A. No.

Q. What was the width of the boards you used to make the ventilators out of? A. I don't understand that.

MR. KIRLIN: How wide were the boards?

1416 Q. How wide boards did you use to make the ventilators out of? A. We didn't make the ventilators. The ventilators were made on shore and sent on board all ready.

Q. How wide were the boards out of which those ventilators were made? A. I don't understand.

(By consent, the captain translated the question to the witness.)

WITNESS: The ventilators are 8, 9, or 10

inches; but I didn't take the measurement. That is, the horizontal you mean?

Q. Yes. A. Yes.

Q. Were the boards about as far apart as the width of the boards?

Mr. Kirlin: Were they square?

Q. The boxes were square? A. The boxes were 1418
square.

Q. Were the vertical ventilators larger? A. Certainly much larger.

Q. Were the vertical ventilators larger? A.o1

Q. Which way were the vertical ventilators placed? Did the slats point fore and aft or point athwartships? A. The boards?

Q. I said the slats. A. Cross-ships.

Q. Athwartships? A. Yes.

Q. So that the width of the board was fore and 1419
aft? A. No; the boards were on the side—cross-ships.

Q. The boards were athwartships? A. Yes.

Q. And the slats pointed fore and aft? A Yes.

Q. How could you make the fore-and-aft horizontal ventilators open into the vertical ventilators and get the benefit of the circulation of air? Did you cut a hole in the plank out of which the vertical ventilator was made? A. No. The ventilators were out of pieces. They were in 1420
pieces. And then one across the other. I can't tell you that in English.

Mr. Kirlin: Do you mean the ends of the horizontal ones came up against the vertical ones—the ends of the pieces?

Witness: No.

Mr. Kirlin: Tell the captain in Dutch.

1421 (The captain translates the answer.)
Witness: The fore-and-aft ventilators went right through the vertical ventilators.

MR. KIRLIN: Right through the middle of them?

Witness: Yes, And then the athwartship ventilators went just on top over there—just near the
1422 side of the vertical ventilators,—and through the fore-and-aft ventilator; just cut out for it.

MR. KIRLIN: Cut out the joint?

Q. You say the fore-and-aft ventilators passed through the center of the vertical ventilators? A. Yes.

Q. If that is so then the boards of the vertical ventilator must have been placed with their heads
1423 fore and aft and the slats pointing athwatships? A. With the planks across; with the slats fore and aft; and just the long-ships goes in them.

Q. How large are the vertical ventilators? A. 14 inchse, about.

Q. 14 inches square? A. Square, yes.

Q. Are you sure now which way the slats of the vertical ventilators pointed? A. Yes.

Q. Which way did they point? A. I don't understand.

1424 (The captain translated the question to the witness.
Witness: The slats pointed athwartships.

Q. And then the fore-and-aft horizontal ventilators passed through the center of the vertical ventilators between the boards composing the vertical ventilators?A. Is that right? A. Yes.

Q. How were the athwartships ventilators placed so as to open into the vertical ventilators? A. Some go alongside the vertical ventilators, and the others between them.

Q. How close did the athwartship ventilators run to the vertical ventilators? A. Some of them on the side of them.

Q. Some of them touched the vertical ventilators? A. Some of them touched the vertical ventilators, and the others between the vertical ventilators.

Q. And some were half way between the two vertical ventilators? A. Yes. 1426

Q. How did those athwartship ventilators that were half way between the vertical ones do any good? A. They passed the long-ships ventilators, fore and aft.

Q. Did they communicate with the fore-and-aft ventilators? A. Yes.

Q. Are yon sure now whether in the case of the horizontal ventilators, the boards composed the upper or lower sides, or the lateral side? A. I cannot tell; I forget it. 1427

Q. Were these 7 athwartship ventilators placed at equal distances from each other? A. I didn't take the measure of it. They parted so that one of the cross-ships ventilators touched the vertical ventilators, and then the other and cross-ships ventilator was between them.

Q. Won't you just indicate on this diagram where the athwartship ventilators ran? (Libelants' exhibit A. shown witness.) A. (Witness indicates 6 of the 7 athwartship ventilators.) I 1428 don't know where the seventh was; but there were seven. But I think this ventilator is closer on the bulkhead (witness indicating)—I think the forward one was nearer the bulkhead that I have marked it.

Q. You mean the one that communicated with the permanent iron ventilator? A. *This* iron ventilator.

Q. You think that iron ventilator is a little further forward than you marked it? Is that

what you say? A. No. This is a little further aft —this is a little further to the hatch. It is about here, I think (witness indicating). And this is from the bulkhead to the hatch (witness indicating) This is wrong here. I thought *this* was the bow, but it is the stern (witness pointing on diagram).

Q. Is there anything wrong on this diagram?
1430 A. This is wrong (witness indicating). I made a mistake, because I thought *that* was the bow, and *this* the stern (witness pointing on diagram).

Q. Is there anything wrong there that you want to change? A. This is wrong here (witness indicating the one that he had marked at the aftermost end of the hold with the blue pencil).

Q. Leaving that one out, you have only given us five. Where are the other two? A. No, I have given you seven, because *there* is one at the for-
1431 ward end of the hold.

Q. That makes six. Where is the other one? A. I don't know; I can't tell; but I know there were seven.

Q. Now, with reference to these athwartship ventilators, where did you find the damaged rice when you reached New York? A. I don't know. The men pulled the ventilators out before they took the bags away.

Q. Judging from the position of the ventilators
1432 as you remember their position, between what ventilators do you think the damaged rice was found in New York? Suppose you would call the forward athwartship ventilator next to the engine-room bulkhead No. 1, and so on to No. 7, which would be the aftermost ventilator? Between which of those athwartship ventilators was the damaged rice found? A. I can't tell, because I don't know where the seventh ventilator is, fore or aft the hatch. I know the damage was here in the middle of the floor just along the hatch (wit-

ness indicating the direction of fore and aft); I don't mean in the middle of the ship, but here in the middle fore-and-aft way.

Q. Was there any damaged rice further forward than the forward coaming of the hatchway in No. 3 hold? A. Yes.

Q. How much further forward did the damaged rice extend? There was damage about *here*, the first tier (witness indicating the wings of the ship 1434
a little abaft the forward starboard ventilator); and not so much as there, the second tier (witness indicating the position in the starboard wing abreast the centre of the hatch).

Q. Was there any damaged rice further aft than the after coaming of that hatch? A. Yes, a little bit.

Q. How much aft did the damaged rice extend? A. It was further from the bulkhead aft than forward.

1435

Q. Then you mean in the after part of the hold there was a greater distance from the bulkhead where the rice was perfectly good than there was forward? A. Yes.

Q. But do you think any of the damage was further aft than the after coaming of that hatchway?

MR. KIRLIN: Do you understand that?

WITNESS: No, I don't.

MR. KIRLIN: Was there any damage back 1436
of the hatchway?

WITNESS: Yes, there was a little damage in there too—a little.

Q. Just a little? A. Just a little.

Q. There was very little indeed? A. Very little, yes.

Q. Is that hatchway about the centre of the hold fore and aft? A. It is further from the forward coaming of the hatch to the engine-room

1437 bulkhead than from the after coaming to the after bulkhead.

Q. How many tiers of bags inboard from the side of the ship were injured where the damage was the worst? A. There was a little damage in the second tier; not much.

Q. Was not the third tier damaged also? The third tier was somewhat damaged in places, was
1438 it not? A. No. I didn't see any damage in the third tier.

Q. You have testified that you thought there were about three damaged bags on the starboard side to two on the port side. Is that right? A. Yes.

Q. Isn't it true that the starboard bags that were damaged were damaged worse than the port bags that were damaged? A. Well, I think the most damage came on the starboard side.

1439 Question repeated. A. Some bags that came from the port side were damaged too.

Q. Don't you think that most of the damaged bags from the starboard side were in worse condition than the damaged bags from the port side? A. Well, I can't tell from what side came the worst damage.

Q. You mean you were not watching, or that they were damaged nearly equally? Which do you mean? A. I don't understand.

1440 Q. Were you not looking to see where the worst bags came from? A. I don't understand you.

Q. Didn't you see where the worst bags came from? A. No, I didn't see.

Q. Was there any damage on the port side which extended more than one bag from the skin of the ship?

Mr. Kirlin—Do you understand that?

(Witness.) No, I do not.

MR. KIRLIN—He means were the second or third tier on the port side damaged.

(Witness.) The second and third tier from the side you mean?

MR. KIRLIN—Yes, on the port side.

1442

(Witness.) Not the third tier, but some of the second tier were damaged.

Q. Were some of the second tier on the port side damaged as well as the starboard side? A. Yes, damaged; there was stain.

Q. How far forward did you find damage in the second tier from the skin of the ship? A. I can't tell. There was not so much damage in the second tier, but some bags came out that were stained. I think that was only through the hatch.

1443

Q. Just opposite the hatch? A. Just opposite the hatch, yes.

Q. From the place where the damage to the second tier began forward to where it ended aft every bag was damaged, was it not? A. No.

Q. From the place where the damage to the second tier began forward to where it ended aft every bag was damaged, was it not? A. No.

Q. Do you mean it was an occasional bag in the second tier that was damaged? A. Some of those bags were damaged, but not all.

1444

Q. Don't you mean that in the second tier the bags in the forward part of the hatch were all right, and the bags in the after part of the hatch were all right, but the bags in the middle part were damaged? Is that what you mean? A. Yes; but I can't tell where was the damage in the second tier.

Q. But in the place where damage to the second

tier extended every bag was damaged? A. No. I don't believe so. It was some bags, not all.

Q. Do you mean that the damage affected every other bag, or only the third bag? A. No. I think there was a bag damaged, and another one was dry.

Q. The next one to it? A. Yes.

1446 Q. And then the one beyond that would be damaged, and then the next one would be dry? Is that what you mean? A. Yes, that is what I mean.

Q. How high up in the hold did the damaged rice extend? A. On the outside tier up to the deck.

Q. Was there any damaged rice in the top tier directly under the between decks? A. Yes, on the sides. Not in the middle of the ship, but on the sides.

Q. You mean one bag next to the skin of the ship? A. May be three or four; I don't know; I 1447 didn't count those tiers; because you can't cross over there on account that they were in.

Q. Were you watching when the cargo came out from there? A. Yes.

Q. The voyage was a smooth voyage on the whole, wasn't it? A. I don't understand "smooth" voyage.

Q. A calm voyage? A. That time we came from Singapore to Suez it was all right.

Q. You didn't have any great storms, did you? 1448 A. What do you call "storms"?

Q. Tempest, hurricane, anything like that? A. What is "tempest," "hurricane?"

Q. Do you know what that means? A. No, I don't understand that.

(The captain translated the question to the witness.)

(Witness.) No, not that I know of.

Q. Nothing on board the ship was injured by any storm? A. Not that I know.

Q. How many days on that voyage did you have to put your hatches on? A. I can't remember. Whenever it came a little rain we had to put on the hatches.

Q. How many days did you put them on because the weather was rough? A. I forget that; I can't tell. 1450

Q. But you are very sure that your hatches were on every time the weather was rough enough to ship any seas on deck? A. That I am sure of.

Q. You are positive of that, aren't you? A. Yes.

Q. You are positive no water got down through the ventilators, aren't you? A. Yes.

Q. When you took off your iron ventilators on deck, you are sure that you carefully bound them up with tarpaulins and lines, aren't you? A. Yes. 1451 We put first a wood cover on them.

Q. First a wooden cover? A. Yes; and then tarpaulin covers, and then lines around.

Q. You are sure that no water got in that way? A. That I am sure of.

Q. Is that part of your duties—to make the ventilators fast? A. Yes.

Q. What kind of dunnage did you have on the sides of the hold? A. We had bamboo.

Q. How were they made fast together? A. 1452 With lines around.

Q. How far apart were the sticks of bamboo? A. About one inch.

Q. Were the sticks of bamboo all parallel, or did they run criss-cross? A. They were all up and down in the lower hold.

Q. They were vertical? A. Vertical, yes.

Q. And inside of those you had mats? A. Yes.

Q. What did you put on the stringer plates? A.

1453 Put some wood in them to make it right straight, and then we put planks around them, and then over mats.

Q. Did you put any bamboo on those stringer plates? A. No.

Q. When you watched the carpenter sounding you couldn't tell what he found, could you, by what you saw? A. No, I couldn't tell by what I
1454 saw.

Q. You stated that there were no leaks in No. 3 hold. Do you state that as a matter of your own knowledge, or is that only your supposition? A. I don't understand you.

Q. When you stated that there were no leaks in No. 3 hold what knowledge have you on that subject, if any?—What word don't you understand? A. I understand very little of it.

Q. Do you know what the word "knowledge"
1455 means? A. No.

Q. That is what a person knows, what he is sure of because he sees it himself—You have sworn that there were no leaks in No. 3 hold, haven't you? A. Yes.

Q. Now, how are you sure of that? A. Because, if there were leaks, I would see them. When there are leaks then the water has to run in.

Q. It depends upon where the leaks are, doesn't it? A. When they are out of water.

1456 Q. If they are out of water then they only would be covered with an occasional wave? A. There were no leaks in the ship.

Q. What makes you think there was no leak? A. If there was water in the ship we would have it when we sounded it.

Q. Isn't what you mean that you believe from what the carpenter said that there was no water in the bilges, and you thought that if there was any leak there would be water in the bilges? Is that what you mean? A. Yes

Q. Do you know anything more than that? A. Yes.

Q. What else do you know? A. Because, when the ship came to port, I opened the bilges myself, and saw there was no water in there.

Q. Is that all you know about the leaks? A. Yes—and I know we did not pump.

Q. You don't have anything to do with the pumping, do you? A. No. 1458

Q. You took the engineers' story for that, didn't you? That is, that is all you know about the leaks, isn't it? A. Yes.

Q. You have testified that there were no repairs made to No. 3 hold. How do you know that? A. When there is something repaired on the ship I must see it. I am aboard the ship every day.

Q. But you are not on board the ship twenty-four hours every day, are you? A. We would not 1459 want to repair in the night time.

Q. Were you on board the ship all the time that she was repairing? A. Every day.

Q. You mean you never left the ship? A. In the night time sometimes.

Q. You left the ship evenings? A. Sometimes.

Q. And went ashore? A. Yes.

Q. In the day time you never left the ship? Is that what you say? A. That is what I say.

Q. But you had no special charge of those re- 1460 pairs, did you? It is not particularly your duty to watch the repairs? A. No.

Q. It is quite possible they might have pounded one rivet in No. 3 hold without your seeing it, isn't it? A. I don't understand.

Q. Which word don't you understand? Do you know what a "rivet" is? A. No.

(The captain translates the word "rivet.")

1461 (Witness.) Not in the time that I am aboard the ship.

Q. When they were repairing the ship they were making a lot of noise aft, weren't they? They were pounding and making a lot of noise aft? A. No. There was not.

Q. Didn't they make any noise when they repaired the ship? A. They made some noise, but

1462 not so much.

Q. Do you think, if they had pounded a rivet in No. 3 hold, that you would have heard it immediately and rushed up to see what was the matter? A. They have to open the hatches when they go down, and we can see in the hatch when there is somebody down. The hatches are closed every day.

Q. What was the condition of the dunnage when the rice was discharged in No. 3 hold? A. Some

1463 of the mats on the side were dark.

Q. Were they wet? A. Dampy.

Q. Didn't some of those mats drip water? Didn't water drop out of them? A. I didn't see any water in the hold.

Q. Didn't you see any drops of water coming from the mats when they were lifted up? A. No.

Q. Weren't those mats as wet as if they had been dipped in a bucket of water? A. I don't think so. When they dip a mat in a bucket of

1464 water and pull it out, the water runs out.

Q. They were not as wet as that? A. They were not wet at all. Dampy. No water run out. I didn't see any water in the hold—not a drop.

Q. Weren't the planks in those stringer plates wet? A. The planks?

Q. Yes. The shifting boards, or whatever you put in those stringer plates? A. No. There was small wood put in there, and some of them were dampy.

Q. They were only dampy? A. Yes.

Q. You are positive they were not wet, but they were only dampy? Is that right? A. I don't understand you.

Q. Do you know what "wet" means? A. Yes, I know what "wet" means.

Q. Are you positive? Do you know what "positive" means? A. No.

Q. That means perfectly sure. A. Perfectly sure. 1466

Q. Are you sure they were not wet, but were only dampy? A. Yes.

Q. Were you there when the casing was taken off the scupper pipe on the starboard side leading from the between decks? A. No.

Q. Wasn't the casing around that scupper pipe damp? A. No. I didn't see it open.

Q. Was it damp before the casing was taken off? A. No, not that I saw.

Q. Didn't you see the casing after it had been taken off? A. Yes, to-day. 1467

Q. You saw it to-day. Not before? A. No.

Q. How did the damaged bags of rice look? A. They looked dampy, and others the other color.

Q. Did they feel wet to the touch when you felt them? A. I didn't feel them.

Q. You didn't feel them? A. No.

Q. You took good care not to touch them, didn't you? A. Well—

Q. Didn't they have a white mould on them? 1468

(The captain translates the question to the witness.)

A. Some of them were a little mouldy.

Q. What kind of a mould was it? What color? A. I can't tell.

Q. Was it white, or yellow, or green, or what? A. I don't know.

Q. Don't you know what color the mould was? A. No.

Q. When you loaded that rice in Japan you watched every bag to see if it was in good condition, didn't you? A. I can't tell. I did as much as I could.

1469 Q. But you were very careful to see it was all in good condition? A. I was very careful to look after all the bags. But I had my eyes all around me.

1470 Q. You watched the bags as they were coming on board, didn't you? A. In the hold.

Q. In the hold? A. Yes.

Q. And if you saw any bag that was not just right you sent it back, didn't you? A. I did.

Q. How many bags did you send back? A. About a couple of dozen.

1471 Q. And every bag that you sent back from the hold to the ship was taken ashore and left there, was it not? A. I don't know.

Q. As far as you know, it was? A. I saw one time that they sent it back again in a new clean bag.

Q. You made them take it ashore, didn't you? A. I thought it was going ashore.

Q. That time you made them take it ashore, didn't you? A. No.

1472 Q. You loaded that bag? A. Yes.

Q. Where were the men that were filling that new bag? A. It was a lighter-man.

Q. How do you know they were filling that new bag from one of the bags you had rejected? A. I had the bags standing up from that lighter, and they put them on the lighter, and one time I just come on deck and I just saw the fellow take that bag and put it in a new bag, and the bag that was lying on the side was a little stained; and they put it in the sling again.

Q. The rice in the bag was all right as far as you know, was it not? A. So far as I know, yes.

Q. Have you talked to anybody about the kind of evidence you were going to give here to-day? A. I beg your pardon?

Q. What word don't you know? A. It goes too quick for me; I cannot understand it.

Question repeated. A. The captain knows that I came here to court to-day to go over this damage. 1474

Q. Whom did you talk to first about the cause of the damage to that rice? A. I don't understand it. I can't translate it so quick.

Q. Do you know what "cause" means? A. No.

Q. That means what makes a thing as it is. What made the rice wet and mouldy? Whatever made it is the cause. A. I can't tell what cause made the rice damp.

Q. You say you can't tell what cause made it damp? A. No. 1475

Q. Whom have you talked with about the cause of the rice being damaged? A. I have talked that it was sweating.

Q. Whom did you talk to about it? Whom did you speak with about it? A. I spoke with the captain about it and with the mate.

Q. With the captain and with the mate? A. Yes.

Q. Did they tell you they thought it was sweat? A. I told them I thought it was sweat. I don't 1476 know what the captain or the mate thought about it.

Q. Didn't you tell them you hadn't had any experience with sweat, and you didn't know what it was—whether the damage was sweat or not? A. I don't understand you.

Question repeated. A. Yes, I told the captain and the mate that I thought it was sweating.

Q. Didn't the captain tell you he thought it was

1477 sweat before you told him you thought so? A. No. Never.

Q. How soon did you have that conversation with the captain in which you told him you thought it was sweat? A. Oh, it was one time when the captain came on the hatch. I don't remember what time it was. It was the time that we discharged the rice.

1478 Q. Was it while you were discharging the rice? A. Yes.

RE-DIRECT:

Q. You said that you saw the between-deck washed out after that voyage to Charleston? A. To Charleston, yes.

Q. You saw it washed out then? A. Yes.

Q. Put water on it? A. Yes.

1479 Q. How? A. It was with a hose.

Q. With a hose? A. Yes.

Q. Now, did that deck leak? A. The between-deck?

Q. Yes. A. I can't tell.

Q. Don't you know whether any water went through it or not? A. No.

Q. When you were washing it did any water go through it? A. Through the between-deck?

Q. Yes. A I can't tell.

1480 Q. Have you looked since you have been in port to see whether you could find any leaks in No. 3 hold or in the decks? A. There was no water in the between-decks. I couldn't see any leaks.

Q. I am talking about New York now. A. Yes, I am talking about New York.

Q. Have you examined the decks and sides of the ship since you discharged the cargo in New York? Have you looked to see whether there were any leaks in the deck? A. Yes, I have looked.

1481

Q. You have looked? A. Yes.

Q. Were you able to find any? A. I never found any.

WILLEM VAN EYKEN, called on behalf of claimant, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Kirlin: 1482

Q. How long have you been a master mariner? A. 8 years.

Q. How long have you been going to sea in steamships? A. 14 years.

Q. How long have you followed the sea altogether? A. 18 years.

Q. Who is the owner of this steamship, the *Folmina*? A. The Holland Gulf Steamshipping Company.

Q. That is a Dutch corporation, I suppose? 1483
A. Yes.

Q. Who is your manager? A. Joseph de Poorter.

Q. When was the ship built? A. She was built 2 years ago in February.

Q. Where? A. Sunderland.

Q. Is she classed at Lloyd's? A. Yes.

Q. What class has she? A. A1.

Q. What is her length? A. 345.

Q. What is her beam? A. 48. 1484

Q. And what is her depth of hold? A. 29 feet.

Q. Is she a steel or iron vessel? A. She is a steel vessel.

Q. What kind of decks has she? A. The upper deck is an iron deck, and the between-deck is a steel deck.

Q. A web-frame vessel, I suppose? A. No, we have no web frame.

Q. No web frame? A. No.

Q. What kind of frame? A. We have enlarged frames—just the reversed angle irons.

1485 Q. Before you started on this voyage to Japan from New York was your vessel in dry dock? A. Yes.

Q. Was she surveyed in dry dock here? A. Yes.

Q. By whom? A. By Lloyd's surveyor.

Q. And from the dock she loaded a cargo for the East, did she? A. Yes.

1486 Q. Under whose charter was she? A. She was under the charter of H. Vogemann.

Q. Messrs. Barber & Co. were the agents? A. I got my instructions from Mr. Vogemann to follow Barber & Co.'s orders.

Q. And did you load under those orders homeward again to New York from Japan? A. Yes.

Q. Now, prior to that what cargo had you carried? A. Before we loaded for Japan we had a cargo of Kainit.

1487 Q. From where to where? A. From Hamburg to Port Royal and Charleston.

Q. That is manure salt, is it? A. Yes.

Q. After that cargo was discharged had you any cargo from Charleston to New York? A. No; we went in ballast.

Q. In how many holds did you have Kainit? A. In all the holds.

Q. How much did you have? A. About a full cargo.

1488 Q. Is that powder or— A. It is all in bulk; some in sacks, but the main part was in bulk.

Q. Was it coarse? A. Yes.

Q. Coarse grain? A. Yes.

Q. Large grain, I suppose? A. Yes.

Q. What did you do after you unloaded the cargo in the way of cleaning the ship? A. We washed all the holds out with the hose, and swept them down.

Q. Top and bottom? A. Yes.

Q. The sides of the ship? A. Everything.

Mr. Brown: That is in Charleston?

Witness: From Charleston we started, and we finished on the voyage to New York.

Q. You did that while you were coming up to New York? A. Yes.

Q. Then you loaded at New York. What did you take on? A. We took a general cargo.

Q. For what ports? A. We loaded for Singapore, Manila, Hong Kong, Shanghai, Kobe, and Yokohama.

Q. After you discharged your cargo did you prepare the holds for the return voyage? A. Yes.

Q. What kind of a cargo did you bring back? A. We brought back a general cargo, rice, tea, coffe, pepper, hides, and all kinds of stuff.

Q. What was done in the way of preparation of the holds for the return cargo? A. We cleaned the holds, swept the holds with brooms dry, and lifted the limbers and saw that everything was clear—suction box and everything.

Q What condition was your ship in when you started to load your homeward cargo? A. In a perfect condition.

Q. Now, you loaded at what ports homeward? A. We commenced to load in Yokohama; afterward part we had tea, and Japanese curios, and loaded again at Shanghai, Foochow, Hong Kong, and Singapore; and called at Algiers for coal again.

Q. Did you have a full cargo home? A. Yes.

Q. In the No. 3 lower hold all rice? A. All filled up with rice.

Q. In the bottom deck any? A. In the after part of the between deck rice too.

Q. What in the forward part? A. In the forward part we had tea, and Japan curios, and

filled up with other kinds of cargo—several kinds of cargo—case goods.

Q. What did you have in No. 4 hold? A. In No. 4 hold, lower hold, on the bottom, was manganese ore; and on top of that was tea, and some tin.

Q. What did you have in No. 2 hold? A. In No. 2 hold the greater part was hides, and bales of
1494 wool, some tin, and the lower part (just on the bottom) was manganese ore too.

Q. What was in No. 1? A. In No.1, in the fore part, we had wool and hides, and some tin on the bottom, and curios, and coffee, and pepper.

Q. In what condition was the cargo of spice on delivery in New York? A. On discharging, the owner reported to me that a few bags of pepper were damaged in the wing in No. 2 hold. That is all he reported to me.

1495 Q. Did you see the cargo coming out? A. Yes.

Q. How did it appear to be to you? A. In very good condition.

Q. The engine room, I suppose, is between the No 2 and No. 3 holds? A. Yes.

Q. Are the holds separated by iron bulkheads? A. By iron bulkheads, yes.

Q. Did you see the stowage of the rice in Kobe? A. I looked at it occasionally. Yes.

Q. You have heard the testimony of the two
1496 officers have you? A. Yes.

Q. Is there anything to change or add to in their testimony about the stowage? A. No. I couldn't make any remarks on that.

Q. What is your judgment as to the stowage and dunnage of the rice? A. I think it was done in the usual way; in the way it ought to be done with rice cargoes.

Q. Do you know whether it was done by people who were acustonmed to stow rice or not? A. Yes.

Q. Was it? A. Yes. Because three or four weeks ago there was a steamer loading rice too with the same stevedores. 1497

Q. Did you see the artificial ventilation that was provided in the holds? A. Yes.

Q. Was that in accordance with the way the officers testified? A. Exactly. Exactly as the second mate explained it.

Q. Do you remember how those athwartship ventilators were placed—in what proportion—in the hold? A. As fas as I could see, about equally divided between the vertical ventilators— as much as possible equally. I could not give you the exact measurement. 1498

Q. Were any of them abaft the vertical ventilators? A. Yes.

Q. How many? A. I couldn't tell you.

Q. Were any of them forward? A. Yes.

Q. Have you ever carried rice before? A. No. 1499

Q. At what time was the rice loaded? A. It was loaded in the month of February.

Q. What part of the month? A. In the first part of the month—the beginning of February.

Q. And when was it discharged in New York? A. It was discharged about the middle of May.

Q. What kind of weather did you have during the loading period in Kobe? A. During the time we loaded the weather was good.

Q. Can you tell by reference to the log on what days you loaded the rice? A. Very likely. 1500

Q. (Log shown witness.) Look for it. A. We started on Monday, the 4th of February.

Q. And what days did you continue the loading of the rice? A. We finished the next day.

Q. The 5th? A. On the 5th.

Q. What was the weather on the 3rd? A. On the 3rd there was a strong wind, with snow squalls.

1501 Willem Van Eyken.

Q. How was this rice brought to the ship? A. In lighters.

Q. Do you know whether it was on the lighters on the 3rd of February or not? A. I couldn't say with certainty, but I believe so, because we started on Monday morning at once. I didn't see the lighters load.

Q. Were the lighters open lighters? A. Yes.

1502 Q. Was the rice on deck or under deck? A. The open lighters are open. Some of it was half in the hold and half on top. Different kinds of lighters, though.

Q. From Kobe you said you went to Moji? A. To Moji—for bunker coal.

Q. What kind of weather did you have on the passage from Kobe to Moji? A. We encountered a gale, with rainy weather.

Q. Have you got a table showing the Dutch

1503 words corresponding to the English words on the Beaufort Scale? A. Yes.

Q. (Paper shown witness.) Is that it? A. Yes.

Q. What kind of weather do you call in Dutch the weather that you had on the way from Kobe to Moji? A. Stormy weather.

Q. What is that on the Beaufort Scale? A. That is from 8 to 11.

MR. BROWN: Do you testify that you had that weather the whole distance?

1504

(Witness.) No.

On what days did you have it? A. It was only one day to go from Kobe. It was only in the afternoon we got the bad weather.

Paper (Beaufort Scale) marked Claimant's Exhibit 5, July 30, 1901.

Q. Now during that time were you able to keep the hatches open? A. No.

Q. Did you have to unship the ventilators? A. We had to close them.

Q. You had to close them? A. It was not necessary to unship them, because there was no water coming over them. It was an inland sea.

Q. Then you went from Moji to what port? A. To Shanghai.

Q. What kind of weather did you have on that passage? A. Bad weather on the voyage; stormy weather, and heavy snow-squalls, and a rough sea.

Q. What weather on the Beaufort Scale—between what points? A. Stormy weather; from 8 to 11.

MR. BROWN: For how long?

(Witness.) Stormy weather was only one day.

MR. BROWN: Out of how many?

(Witness.) About four days—four and a half days.

Q. For one day stormy weather? A. Yes.

Q. What was it on the other days? A. It was pretty rough.

Q. How did it affect the vessel? A. We were rolling very heavily, and got water over our deck and hatches, and heavy pitches of the ship too.

Q. Did you have to close down the hatches? A. Yes.

Q. How about the ventilators? A. We closed them all.

Q. Does that mean you stopped them at the top or took them off? A. Well, I don't recollect just now whether took them off or closed them up.

Q. At Shanghai how long were you loading? A. We were loading there four days.

Q. Then from Shanghai you went to what port? We went to Foochow.

Q. What kind of weather did you have on that passage? A. We had good weather on that passage.

Q. Your expression in the log "stormy weather" means what on the scale? A. It means from 8 to 11.

Q. Did you have any any cargo to discharge at Shanghai? A. Yes.

1510 Q. Did you discharge anything from No. 3? A. I don't think so. I think the cargo was all in No. 1, if I recollect right.

Q. What kind of weather did you have in Shangai? A. Good weather.

Q. From Shanghai to Foochow? A. Yes.

Q. And at Foochow how many days loading, and what days were they? A. (Witness looks in log.) Three days in Foochow. It was good weather all the time.

1511 Q. What days were you at Foochow? A. The 21st, 22d, and 23d, and we sailed on the 24th in the morning.

MR. BROWN: What month?

(Witness.) February.

Q. Your next stop was Hong Kong, was it? A. Yes.

Q. How was the weather at Hong Kong? A. (Witness looks in log.) We had good weather,
1512 and good weather on the passage from Foochow to Hong Kong.

Q. Did you load at Hong Kong? A. Yes.

Q. When did you leave there? A. We left Hong Kong on the evening of the 1st of March.

Q. What kind of weather did you have from there to Singapore? A. We had fairly good weather; fresh breeze.

Q. Were you able to keep the ventilators open? A. We had some light rain squalls on the voyage, and then, of course, we closed them. At other times we kept them open.

Q. When did you arrive at. and when did you leave Singapore? A. We arrived on March 8th, and left on the 17th.

Q. What kind of weather did you have in Singapore? A. We had squally weather.

Q. What precautions did you take there with regard to cargo, if any? A. We filled up No. 3 between deck, and part of the other holds, and over the between decks too.

Q. During the squally weather were you able to load? A. Sometimes we had to stop loading.

Q. Did you keep the cargo dry? A. Some cargo we sent back that was wet—that became wet in the lighters.

Q. Did you give the date when you left Singapore? A. The 17th of March.

Q. How was the weather from Singapore to Algiers? A. The weather from Singapore to the Suez Canal, to Port Said, was very good—light breeze and good weather. We had in the Mediterranean, from Port Said to Algiers——

Q. What precautions did you take on the voyage for ventilation? A. (Continuing) It was a fresh breeze. A strong breeze one day.

Q. Now, during this voyage what precautions did you take for the ventilation of the rice? A. As soon as the weather permitted we took the hatches off, and top of the temporary ventilator, and opened the other ventilators, and we put in wind-sails into the temporary ventilator.

Q. When did you leave Algiers? A. We left Algiers on the 19th of April.

Q. That was the day of your arrival at Algiers, was it not? A. Yes, and the day of sailing too. We arrived and sailed the same day.

Q. You called there for bunkers? A. Yes.

Q. What kind of weather did you have coming along from Algiers? A. We had some stormy weather sometimes.

1517 Q. When? A. (Witness looks in log.) I give you the nautical time now for the stormy weather.

Q. Very well. A. The 22nd of April we had strong winds and squally weather, and high head sea, heavy pitching of ship, much water over the deck and hatches.

Q. How was the weather on the 23rd? A. Then it was abating. Strong breeze.—The 22nd of
1518 April is the 23rd of the civil date.

Q. How was the sea on the 23rd? What was the behavior of the ship? A. There was a high head sea, with a heavy pitching ship.

Q. Did you ship any water that day? A. Got much water over the deck and over the hatches, and we broke the steering chain.

Q. Did you have to stop to repair that? A. Yes, we had to stop about an hour.

Q. How was the weather up to the 29th of
1519 April? A. We had variable weather with moderate sea up to the 29th.

Q. How was the weather on that date? A. Strong breeze, threatening weather, with rain, and northerly swell, with pitching and rolling ship, got much water over deck and hatches.

Q. How was the weather on the 30th of April? A. Then the weather was abating.

Q. On the 1st of May? A. Got stormy weather, with at intervals heavy squalls, and high, difficult
1520 head-sea; heavy pitching and rolling ship; shipped bodies of water over deck and hatches.

Q. What is this weather on the Beaufort Scale? A. From 9 to 11. If anything, it is from a fresh to a whole gale included. n

Q. On May 2nd and 3rd how was the weather? A. On May 2nd the wind was decreasing and sea moderating, with north-westerly swell.

Q. How was the weather on the 4th of May? A. Moderate gale.

Q. On the Beaufort Scale? A. Yes.

Q. What number is that? A. No. 7.

Q. How was the sea? A. It was a high cross-sea, with a heavy pitching and rolling ship; got bodies of water over deck and hatches; engines racing.

Q. How was the weather the rest of the voyage? A. After that the wind and sea decreased, and we got favorable weather; sometimes a strong breeze; now and then a pitching ship. 1522

Q. And on what date did you arrive in New York? A. We arrived in New York on May 9th.

Q. Had you a full cargo? A. Yes.

Q. Were you down to your marks? A. No, we were not down to the marks, but the ship was filled up.

Q. About what was your draft? A. The draft on arrival was 20 feet 4 inches forward, and 20 feet 5 inches aft.

Q. What is the mean draft at the mark? A. 23 1523 feet 9. That means summer draft—summer load-line.

Q. Was this loading of the rice in Japan done under inspectors? A. Yes, there was an inspector appointed to look after the loading of the rice.

Q. What sort of an inspector is this? A. I am not sure but I believe he was a Lloyd's surveyor; I couldn't tell for certain.

Q. Do you know who appointed him? A. The agents appointed him—No, I couldn't tell who ap- 1524 pointed him.

Q. Was he there during the loading of the rice? A. Yes.

Q. Was he supervising? A. Yes.

Q. What is the diameter of these iron ventilators—these permanent ventilators? A. I don't know exactly; I didn't measure them; I believe about 14 inches.

Q. How are they shaped at the top? A. At the top they have cowles.

1525 Q. Bell-mouthed? A. Yes.

Q. Are they adjustable, so you can move them around towards the wind? A. Yes.

Q. How many of them lead through the between deck? A. Two in each hold.

Q. Is there another one that leads to the between deck No. 3? A. There is one that leads only to the between deck. Yes.

1526 Q. Now, during this voyage what precautions did you take in regard to ventilation? A. We opened the hatches as soon as the weather permitted it, and left the ventilators open as long as possible; and put in a wind-sail to get more draft.

Q. Did you see the discharge of the rice in New York? A. I was not there all the time. I was there now and then in the morning; sometimes in the afternoon.

Q. Did you see the cargo come out of the No. 3
1527 between deck? A. I saw part of it.

Q. What condition was that in that you saw? A. It was in very good condition.

Q. Was there any damage to it? A. No.

Q. Did you see the cargo when they took off the between deck hatches and began to unload from the lower hold? A. No. I was not there at the time.

Q. What part of the cargo from the lower hold did you see discharged, if any? A. I saw part of
1528 the cargo discharged in good condition, and part of it was damaged.

Q. To what did the damage extend? A. I couldn't tell you exactly.

Q. To what extent was the cargo damaged? A. I couldn't tell you.

Q. Do you know how many tiers were affected? A. No. I was not there at the time they took away the tiers; so I couldn't tell you exactly from my own experience.

Q. Did you see it coming out, or did you see it after it had come out first? A. I saw some of it going over the sides on board of the lighter.

Q. Was any of the cargo that you saw wet or dripping? A. No.

Q. What was the condition of it? A. I saw some of the bags were stained and discolored.

Q. Were the bags broken in part? A. I saw a broken bag too. Yes.

MR. BROWN—You mean only one?

(Witness.) The time I was there, yes.

Q. Do you know what part of the hold the damaged bags came from? A. Yes.

Q. What part? A. They came out of the wing.

Q. On which side? A. On both sides.

Q. Do you know how far they were affected in from the side of the ship? A. No, I couldn't tell.

Q. Of your own knowledge? A. No.

Q. Do you know how far down in the hold the damage extended? A. No. I only got it by report.

Q. After the cargo was discharged what was the first knowledge you had of any claim on the ship—how long after you were discharged? A. It was only about a week ago, when Mr. Winchester notified me that Convers & Kirlin wanted to see me.

Q. Was that the first you heard of any claim on the ship? A. Yes.

Q. How long was that after the cargo was discharged? A. I think about two months.

Q. You had been here all the time? A. Yes.

Q. At the time of the discharge were there any surveyors on board examining the ship to ascertain the cause of the damage? A. The Port Warden had been on board of the ship.

Q. Did you see Captain Salter, who is now

1533 present, at the ship? (Counsel indicating.) A. I believe I saw this gentleman, but I don't remember on what day or what time.

Q. Was it during the time that the cargo was being discharged? A. I couldn't tell you exactly; I don't recollect.

Q. Did he report to you any cause that he had been able to discover of damage to the cargo?

1534 Objected to.

A. No.

Q. Did you see him looking for any possible cause? A. I don't recollect.

Q. Has there been a survey made by Lloyd's surveyor since the cargo was discharged for the purpose of ascertaining the condition of that hold? A. Yes.

1535 Q. Has there been any survey made by any other surveyors? A. There were two other gentlemen on board too, but I don't know by which firm they were sent.

Q. Do you know who they were? A. No.

MR. BROWN: Who was the first one—Lloyd's surveyor?

MR. KIRLIN: Mr. Congdon.

(Witness.) Mr. Congdon.

1536 Q. Have any of these surveyors, as far as you know, been able to discover any leak or injury to the vessel which might have accounted for the damage? A. No.

Q. Have you yourself made an examination to discover whether you could find any leaks anywhere? A. Yes; I made a very careful examination.

Q. What did you examine? A. I examined the decks and the sides carefully with a candle every-

1537

where, and I examined the pipes too; let water in too.

Q. Were there any leaks in the No. 3 hold of the vessel? A. No, nothing whatever.

Q. Have any repairs or alterations of any kind been made to No. 3 hold, or to the decks above it, or the pipe connections, since the ship has been in port? A. No.

1538

Q. I gather from some of the questions that the counsel on the other side thinks that some rivets have been tightened up since then. Has anything of that sort been done? A. No.

Q. Has there been any restraint or hindrances of any of these surveyors in any of their examinations? A. No. There were two surveyors on board. I don't know their names. But they were very well satisfied that we assisted them so well.

1539

MR. BROWN: I move to strike out the testimony as to the state of mind of the surveyors.

Q. Now, captain, what, in your opinion, was the cause of this damage to the bags of rice? A. I think it was the heating of the cargo that caused the sweat and the damage to the bags.

Q. How would you account for a damage extending in say two tiers, or into the third tier, from the side of the ship? A. Well, if the cargo gets heated, then, of course, it gets a higher temperature, and it causes condensation, and it may go further on in time.

1540

Q. Were there any evidences on the side of the ship, or on the deck, of the sweating? A. Yes.

Q. Where? A. Just above on the deck you could see it—just above where the damaged cargo had been—and on the sides too. It looked more rusty.

Q. On which side? A. On both sides

1541 Q. In what part of the hold? A. It is about opposite the hatch—a little bit more forward. It stands a little bit more forward than aft.

Q. (Claimant's Exhibit 1 shown witness.) Look at this little sketch, claimant's exhibit 1, and state whether that shows the arrangement of the stringer plates correctly? A. Yes.

Q. Did you see what precautions were taken in
1542 the dunnage and stowage of the cargo that was adjacent to or on top of those stringer plates, or underneath them? A. Yes.

Q. What was done then? A. There was some stone, wood and boards laid in the stringer, and then covered with planks—on top and on the outside too—all around.

Q. How high did that dunnage extend with reference to these angle bars that are on the stringers? A. The dunnage extended as high as
1543 the angle irons; and the boards were put on additional.

Q. After the cargo was taken out did you see the condition of those stringer boards—stringer beams? A. When I came down in the hold it was all dry.

Q. Was there any accumulation of water in any of those? A. No.

Q. Could any water accumulate in any of those stringers? A. No. It would run away.

1544 Q. Suppose there had been a leak in the side of the ship, where would it have gone? A. It would run down the side of the ship.

Q. How could it get down? A. Those stringer plates are connected with the skin of the ship, but just behind the frames there is a square hole left open where all water can run down there.

Q. By each frame? A. Yes.

Q. How big a hole is that? A. It is a hole about maybe 6 by 4, or 5 by 4. I don't know exactly; I didn't measure it.

1545

Q. Are those holes behind the outermost angle-bar? A. Yes.

At the request of counsel for the libellants, the examination is adjourned to Thursday morning, August 1, 1901, at 10.30 o'clock A. M.

New York, August 1, 1901.
10.30 o'clock A. M.

1546

Met pursuant to adjournment.

Present—Mr. Kirlin; Mr. Brown.

Willem Van Eyken's Direct-Examination continued by Mr. Kirlin:

Q. Captain, was there any water in the hold at any time during the voyage?

Mr. Brown: If you know.

1547

A. From the soundings I saw there was from 2 to 4 inches in the bilges.

Mr. Brown: Did you see the soundings? Did you take the soundings?

Witness: The soundings are reported to me by the chief officer, and I saw the carpenter very often sound them.

Mr. Brown: You are judging from those reports made to you?

1548

Witness: No. I often saw the carpenter sound the bilges.

Q. Was there any report to you at any time during the voyage of any accumulation of water in the hold No. 3 from any source. A. No.

Q. Now, captain, is there any sheer to the bottom of the ship in the No. 3 hold inside the bottom of the bilges? A. If there is any sheer it is very little in the bottom.

1549

Q. Is there any sheer to the striner plates? A. Yes.

Q. How much, about, in the length of the No. 3 hold? A. I couldn't tell you that.

Q. About how much would it be? A. It is very difficult to say, because it is nearly in the middle of the ship.

Q. What is the length of No. 3 hold approxi-
1550 mately? A. Between 50 and 60 feet.

Q. In that length, what do you judge the amount of sheer of the stringer plates would be? A. I don't know. I would have to measure that to find that out.

Q. We will probably get it measured by somebody else, but you can give us an approximate idea whether it would be 2 inches, or 6 inches, or 2 feet, can't you? A. Yes. It is not 2 feet. I don't know how much it is. But the lowest point must
1551 be about in the midships—the lowest point of the sheer must be about in the midships between No. 3 and No. 2.

Q. It would be in the engine space? A. Yes.

Q. On the way over you testified that there were certain days on which there was stormy weather, and you described it. A. Yes.

Q. What was the effect of that weather that you experienced on the vessel itself? A. The ship was laboring very heavy.

1552 Q. Does a steel vessel labor or bend more in a sea way than an iron vessel? Do you know about that? A. Probably it does.

MR. BROWN: Has he had any experience with the two kinds of vessel?

Q. Have you been in both kinds of vessels? A. Yes.

Q. Had opportunities for observing different vessels in heavy weather? A. Yes, I have.

Q. Now, captain, is it, in your opinion, possible

for a vessel to open her sides or her decks sufficiently to let in any appreciable quantity of water, and close up again afterwards so that those openings can not be discovered by inspection? A. I couldn't prove that.

Q. Have you ever had any such experience as that yourself? A. No.

Q. In your experience have you ever had any leaks start in vessels—deck or side? A. Yes.

Q. Has not the part that started been loosened to such an extent that you could see the looseness at the end of the voyage when the vessel was again in a state of rest?

MR. BROWN: When you say see it do you mean see the effect that has on it? Is that what your question means?

MR. KIRLIN: Yes.

A. Yes.

MR. BROWN: That is, you could see it?

(Witness): Could see it. Yes.

Q. If a rivet, for example, has ever started so as to leak, it always remains loose until it is tightened up again, doesn't it? A. As far as I know. Yes.

Q. Now, you say that the vessel is in the same condition to-day in the No. 3 hold that she was when she discharged this rice, do you? A. Yes.

Q. And that you have not been able to find any leak anywhere? A. No, I have not.

Q. The vessel is still in port, is she? A. Yes.

MR. KIRLIN: Now I formally offer to the counsel on the other side the fullest facilities for inspection and examination of the vessel, with a view to enabling them to discover, if they can, how the water that they

say entered the No. 3 hold and damaged the cargo got there.

MR. BROWN: How long will counsel for the claimant undertake to keep the vessel here for purposes of inspection?

MR. KIRLIN: She will be here to-day and to-morrow at least.

1558 Q. Captain, what was the condition of the pipes that led from the deck into this hold No. 3 during this voyage? A. They were in good condition.

Q. Were there any leaks in any of them? A. No.

Q. What was the condition of the drainage pipes that led from the between deck into the lower bilge of No. 3?

MR. BROWN: I object to questions that merely ask for the conclusion of the witness
1559 without showing how he arrives at the conclusion.

MR. KIRLIN: You can cross-examine as to the basis of his knowledge and the weight of his testimony.

MR. BROWN: The question is objected to as asking for a conclusion.

A. They were all in good condition.

MR. BROWN: Objected to.
1560

Q. How were the openings of the pipes that led to the main deck covered? A. They were covered with a brass screw—

Q. Caps? A. Yes, caps; screwed.

Q. To screw on? A. Yes.

Q. What order were those in during the voyage? A. They were in good order.

Q. Since this rice was discharged have you made yourself examinations of all these pipes? A. Yes.

Q. Are any of them enclosed in a wooden casing? A. Yes.

Q. Which ones? A. The drain pipe from the between deck.

Q. Were the casings taken off in those pipes in New York, or either of them? A. Yes.

Q. Which one? A. I saw on the starboard side the casing taken off.

Q Were the pipes on both sides tried? A. Yes. 1562

Q. What was the result of the test? A. We did not find any leak.

Q. Was the covering of the starboard pipe taken off all the way down to the bottom A. Yes.

Q. I gather from some questions which were addressed to the other witnesses that Captain Salter, who is now present, was on board at that time, was he? A. I don't recollect.

Q. What was found when the covering was 1563 taken off the starboard drain pipe? A. Underneath near to the bottom I saw some kind of dirt, of dust, and some old grain it looked to me, just underneath.

Q. In the casing, do you mean? A. Inside the casing. Yes.

Q. The pipe went through that, as I understand it. What did that have to do with it? A. Nothing as far as I can see.

Q. Did the pipe go through that? A. Yes. 1564

MR. BROWN: You mean the pipe went through this dirt and dust and grain right inside? Is that what you mean?

Witness: Yes.

Q. It went right down through to the bottom, did it? A. Yes.

Q. What significance is to be attached to the

1565 presence of this grain or chaff or dirt, or whatever you call it in this case?

MR. BROWN: Objected to. It seems to me the question should be what is the witness' opinion as to the cause of the condition of that casing.

1566 A. It has nothing to do with it. It makes no difference.

Q. Was there any water in the between decks during this voyage? A. No.

Q. Had the presence of this drain-pipe any connection with the damage to the rice, in your opinion? A. No.

Q. Was this stuff that was in the casing wet or dry? A. It was damp; dampy.

MR. BROWN: It was dampy.

1567

Witness: Dampy, yes.

Q. What made that?

MR. BROWN: Objected to unless the witness has some knowledge.

A. It might have been the condensation which the rice—the damp, the sweat—it might have been the condensation which the rice caused against the

1568 side of the ship.

Q. This drain pipe, as I understand it, went down behind the stringer plates? A. Yes.

Q. And the casing was behind the stringer plates, was it? A. Yes.

MR. BROWN: Does that mean behind the cargo battens?

Q. Behind the cargo battens? A. Yes. Part of the casing may have been just between the bat-

tens; I am not quite sure about that, I don'e remember.

Q. Can you state definitely whether any part of the casing projected into the hold beyond the cargo battens? A. No, not beyond the cargo battens.

Q. It did not project? A. Not beyond.

Q. Was any part of the rice in its original stowage in contact with the casing of the pipe? 1570
A. No.

Q. Did you see the way in which the stringers were prepared for cargo? A. Yes.

Q. Have you described that already in your testimony?—No matter. Tell us now how they were prepared. A. They were filled up with pieces of wood, stone, and some of the shifting boards put in, and on top of that small boards around.

Q. Can you state of your own knowledge that 1571
they were filled up? A. Yes.

Q. I suppose the ship has been in the same condition ever since you have been in her, as far as her internal arrangements are concerned? A. Yes.

Q. The same arrangement of cargo battens and flooring? A. Yes.

Q. Beams, and so on? A. Yes.

Q. Has there never been any damage from water to this No. 3 hold since you have been in the ship? 1572
A. No.

Q. Particularly on the outward voyage to China and Japan was there any damage in the No. 3 hold? A. No.

Q. Are you going away now as soon as you are chartered? A. Yes.

Cross Examination by Mr. Brown:

Q. When and where did you take command

of the *Folmina?* A. I took command of the *Folmina* when she was built in Sunderland.

Q. Sunderland, England? A. Yes.

Q. Between what ports did she carry her first cargo? A. From London we went in ballast to Sabine Pass, Port Arthur. I loaded a cargo there for Rotterdam.

1574 Q. What cargo was that? A. It was a cargo of grain and general—filled up with general.

Q. Did you carry your grain in bulk, or in sacks, or both? A. In bulk and in sacks;—in both.

Q. Where did you stow the bulk grain? A. I believe it was in Nos. 2, 3, and 4; but it so long ago I couldn't tell for a certainty.

Q. That was about 2 years ago? A. 2 1/2 years ago, yes.

Q. What was your next voyage? A. The next voyage, we went to Blythe, England—from Rotter-

1575 dam to Blythe.

Q. In ballast? A. In ballast, yes; and took a cargo of coal for Alexandria.

Q. Egypt? A. Egypt, yes.

Q. That is, a full cargo of coal in all the holds? A. Yes.

Q. What was your next cargo? A. From Alexandria we went in ballast to Poti, Russia, in the Black Sea.

1576 Q. What kind of cargo? A. A cargo of manganese ore.

Q. And carried whither? A. For Baltimore.

Q. And that ore you carried in all your holds? A. Yes.

Q. A full cargo? A. Yes.

Q. What kind of a voyage was that one? Rough or smooth? A. We had some rough weather on that voyage.

Q. Were you down to your marks on that voyage? A. Yes.

Q. What are your marks? A. 23 feet 9 inches summer draft.

Q. Were you on your summer draft that voyage? A. Yes.

Q. Were the lower holds entirely full? A. No.

Q. How high up was the cargo stowed in the lower holds? A. I don't know exactly. We got some in the between deck too, to trim the ship, to make her a little bit easy. 1578

Q. How high up do you think the lower holds were filled? A. I don't know exactly.

Q. I do not ask exact; I ask your best judgment? A. I have forgotten; I don't know.

Q. You have no opinion on the subject? A. Not from that voyage; but I suppose, carrying this manganese ore, it ought to have been about two-thirds in the hold—three-fifths or two-thirds, about that.

Q. Have you a log book for that voyage? A. 1579 I believe the log book is in Rotterdam.

MR. BROWN: I call for its production.

MR. KIRLIN: I cannot see any pertinency in that at present. On what grounds do you ask for it?

MR. BROWN: To show the weather that was experienced in detail.

Q. What was your next voyage? A. We went from Baltimore in ballast to New York. 1580

Q. Took a cargo in New York? A. Took a cargo in New York for Australia—Australian ports.

Q. What kind of cargo? A. General cargo.

Q. Any iron ore in that cargo? A. No.

Q. And from Australia? A. From Australia we took some chrome ore, I believe.

Q. Chrome ore? A. Chrome ore, I think it was.

Q. Chrome ore, did you say? A. Chrome ore, yes, and—

Q. What is chrome ore? A. I don't know. It is a kind of an ore.

Q. And is it the same as is sometimes called nickel ore? A. Something like it, I believe; just something like that.

Q. It is very heavy, isn't it? A. Yes, it is heavy.

Q. Did you carry a full cargo of that? A.
1582 No. I believe it was 1,500 tons. Then we had coal, some case meat and horses.

Q. Where did you carry the coal and the chrome ore? A. To St. Lazar, France.

Q. To St. Lazar? A. Yes.

Q. In what holds did you carry the coal and chrome ore? A. We carried the coal in No. 1 and No. 3 holds, if I recollect well; and the chrome ore, I believe, in No. 2 and No. 3.

Q. Chrome ore is extremely heavy, isn't it?
1583 A. Yes, it is very heavy stuff.

Q. Is it as heavy as manganese? A. I think it is heavier.

Q. Is it about the heaviest ore you know? A. I couldn't say. I have not much experience in ores.

Q. Do you know any ore that is heavier? A. I believe copper ore is heavier; I think so. I don't know exactly.

Q. What kind of a voyage did you have with
1584 the coal and the chrome ore on board? A. I don't remember exactly, but I believe we had some rough weather leaving King George Sound, western Australia.

Q. Have you the log of that voyage? A. No. I think I have sent the logs home, it is so long ago.

MR. BROWN: I call for its production.

MR. KIRLIN: On what ground is this called for?

MR. BROWN: The same as before.
MR. KIRLIN: To show the weather?

(Witness.) At that time we discharged our horses in Cape Town, and after we had discharged our cargo in St. Lazar we went in ballast to Cardiff, England.

Q. What cargo did you take at Cardiff? A. We didn't take any cargo. We took only bunker 1586
coal, and went out in ballast. We called at New York for orders, and then went to Norfolk and Fernandina.

Q. Florida? A. We took some phosphate rock in Fernandina, and some rosin.

Q. What else? A. Rosin in barrels and some other cargo, I don't know.

Q. Where did you carry your phosphate rock? A. We carried some phosphate rock in No.2, No. 3, and I believe some in No. 4 but I am not sure. 1587

Q. Phosphate rock is very heavy, isn't it? A. Not so very.

Q. Isn't it as trying on a ship as most of the metalic ores? A. I don't think so.
metalic ores? A. I don't think so.
on that voyage with the phosphatet rock on board? A. From Fernandina we went to Norfolk, and weighed up there with general cargo. And the voyage from Norfolk to Hamburg, I don't know if we had any bad weather; I don't remem- 1588
ber just now.

Q. You discharged the phosphate rock where? A. In Hamburg.

Q. Have you the log of that voyage? A. I think I have, yes.

Q. Is it on board? A. Probably.

Q. Please send it up? A. Very well.

MR. BROWN: I call for its production.

1589 Q. After the discharge of the phosphate rock what was your next cargo, and between what ports? A. Kainit, from Hamburg to Port Royal and Charleston.

Q. What sort of a cargo is kainit? A. I believe it is a mineral salt.

Q. Is it very heavy? A. Not so very heavy. It is rather heavy, I suppose.

1590 Q. Is it carried in bags? A. We had some in bags and some in bulk.

Q. Is kainit a power or does it come in chunks or pieces of considerable size? A. No; it is more like a powder, but if it is a long time in the ship it very often sets together; and they dig it out in lumps.

Q. Don't you discharge the cargo with pick axes? A. Yes.

Q. You always do that? A. When it is neces-

1591 sary. Some of the salt is not so.

Q. It was in that voyage when you discharged at Port Royal? A. Some of it, yes.

Q. That was a full cargo? A. Yes, about a full cargo.

Q. Carried in every lower hold? A. Yes.

Q. Did you take the kainit out of hold No. 3 with pick axes? A. I think so; I don't remember just now.

Q. Was the ship down to her marks? A. I think

1592 she was about down to her marks, but I don't know exactly. It may have been a few inches off. I don't know exactly.

Q. Were you down to your marks when you carried the phosphate rock? A. Yes.

Q. From the launching of your ship up to the carrying of this cargo of kainit, how many cargoes in all did you carry that were substantially ores? A. I think only two: just the manganese ore and that chrome ore I think.

Q. And the phosphate rock and the kainit. And

1593

was there another voyage on which you carried iron ore? A. No. Yes, we did this voyage—the last voyage.

Q. The last voyage you carried iron ore? A. Yes.

Q. Were you down to your marks on each one of those four voyages? A. She was not down to her marks the last voyage.

Q. You mean the one you are just now completing? A. Yes, the one from Japan and China.

1594

Q. In respect of the one on which you carried the manganese ore, on which you carried the chrome ore, on which you carried the phosphate rock, and on which you carried the kainit, were you down to your marks on every one of those four voyages? A. No. We were not down to the marks when we left Australia. We had horses on board at the time.

Q. That is with the chrome ore? A. Yes.

1595

Q. With respect to the other three you were down to your marks? A. With the kainit I couldn't tell; it might be a few inches off. But when we had the phosphate on board we were down, I am sure.

Q. Those four cargoes I have mentioned are very hard on a ship, aren't they? A. Yes, especially the ore.

Q. After your voyage with kainit you only carred two cargoes, one a general cargo to the East and the other a cargo upon your last voyage when you carried the rice? Is that correct? A. Yes. After we completed the voyage with the kainit we went from New York to Japan and China and came back.

1596

Q. That brings you up to the present moment? A. Yes.

Q. During that period where and when has your vessel undergone repairs? A. During which period?

1597 Q. Since you were launched up to the present time. Please state the time of repairs with reference to the order of the voyages that you have mentioned. A. You mean dry-docking included?

Q. All kinds of repairs.

MR. KIRLIN: Dry-docking is not repairs.

1598 (Witness.) No, that is not repairs.—Well, we had a little repairs down at Rotterdam after the first voyage.

Q. Describe the voyage in relation to the ports, or the kind of cargo you carried. A. We came from the Gulf with grain and general cargo to Rotterdam.

Q. Then you repaired in Rotterdam? A. Some slight repairs on deck; I believe it was specially to the bridge deck.

1599 Q. Then where were your next repairs? A. I believe it was in Baltimore.

Q. After which voyage? A. After the voyage from Poti to Baltimore—the voyage with manganese ore.

Q. What repairs were made in Baltimore? A. We had some wet weather on the voyage, and the bridge deck was strained a little bit (that is the deck above the cabin), and the bulkhead just in front of the bridge deck was strained; and that

1600 was straightened and the deck caulked.

Q. Who made those repairs? A. I don't recollect the name of the firm.

Q. Where is their yard? A. In Baltimore.

Q. What part of Baltimore? A. I don't know; I can't tell you. I only went once in Baltimore.

Q. Can't you give the location of the yard with reference to the piers? A. No.

Q. Which side of the river was it on? A. I don't know; I have no idea where it was. It was far away from the ship—I know that. The ship

was not lying in the yard. We were repairing at the time we discharged the cargo.

Q. Was it Speddins, do you think? A. Very likely. I believe that is the name. I think so. I think it was Speddins, but I am not sure.

Q. Were there any repairs at that time to the side plating of the ship, including riveting plates? A. No.

Q. Any repairs to the between decks? A. I 1602
don't think so. No.

Q. Where and when did you next undergo repairs? A. I believe it was in Cardiff when the ship was in the dry dock.

Q. After what voyage was that? A. After the voyage from Australia—the voyage with horses and coal and chrome ore.

Q. Horses and chrome ore? A. Yes.

Q. What repairs were performed in Cardiff? A. We had part of the rudder plating renewed, 1603
and made some alterations on the quadrant—the quadrant that is on top of the rudder. We had a new ventilator made on the bridge deck.

Q. What was the necessity for a new ventilator on the bridge deck? Had the old one been carried away by heavy weather? A. Yes.

Q. That was on the voyage when you carried the chrome ore? A. Yes.

Q. Did you have any other repairs made at that time? A. I don't remember. 1604

Q. Any repairs to the side plating? A. No.

Q. Riveting, or of the between decks? A. No.—Excuse me. You mean the ventilator was carried away on the voyage with chrome ore? You questioned about the ventilator?

Q. If it does not express your meaning correctly, we will repeat it, and you may change it any way you like. A. It was the voyage when we carried the manganese ore.

Q. You want to change that to manganese ore? A. Yes.

Q. Where did you next repair after Cardiff? A. Hamburg.

Q. That was after which voyage? After carrying the phosphate rock? A. Yes.

Q. What repairs in Hamburg? A. Engine-room repairs.

Q. Anything else? A. Not that I remember.

Q. Any repairs to the siding, plating and riveting of the between decks? A. No.

Q. Where next did you repair? A. The next repair, I believe, was in New York.

Q. You mean at the end of the last voyage? A. Yes; after we discharged the——

Q. The rice? A. No; the cargo of kainit.

Q. The cargo of kainit. What were your repairs there? A. Engine-room repairs, and something to the steering chain, I believe.

Q. Who performed those repairs? A. Mr. Edgett did those repairs.

MR. KIRLIN: Where?

Witness: In New York.

Q. Who performed your repairs in Cardiff? A. I believe it was a dry-dock company.

Q. Is there only one there? A. No, there are several.

Q. What was the name of the dry-dock company? A. I don't remember.

Q. Who performed them in Hamburg? A. I don't remember the name.

Q. Did you have any more repairs after the New York repairs you have just mentioned until the repairs at the close of the voyage in controversy? A. We had some engine-room repairs in Algiers on the voyage out to China and Japan, and some engine-room repairs in Port Said, too,

and engine-room repairs in Singapore, and engine-room repairs in Kobe.

Q. But no other repairs? A. No.

Q. Were there any repairs to the between-deck scupper pipes at any of these times, or during the time you commanded the ship? A. No.

Q. Have there ever been any repairs to the ventilators, or any of the pipes or tubes passing through No. 3 hold? A. No.

Q. You testified that on the voyage preceding the last one you carried general cargo to the East. Can you state a little more in detail what kind of general cargo you carried in No. 3 hold on that voyage? A. You mean from here to Japan?

Q. From New York to Japan and China. A. We had quite an amount of machinery and iron on the bottom.

Q. Was that in cases? A. I believe there were some rails too. Yes, some of it was in cases, and some of it not.

Q. What kind of machinery was it that was not cased? A. I don't know; I don't remember that.

Q. Were there any boilers or shafting? A. I don't remember; I don't think so.

Q. Do you remember any other kind of general cargo or other cargo that you carried in No. 3 hold on that voyage? A. We had some government goods in there for Manila too.

Q. What kind of government goods? A. All kinds; stores, provisions.

Q. Canned goods? A. Very likely.

Q. Do you remember any government goods that were not canned? A. Yes. I believe they had some brooms on board of the ship, too, for the government.

Q. Do you remember anything else? A. We had some iron pipes on board for the government.

Q. Iron pipes? A. Yes—iron or brass, I don't recollect quite well; iron or brass.

Q. Do you remember anything else? A. No, I don't recollect all the details, but, if you would like to know, I will try to get a copy of the manifest from Mr. Barber. He will know.

Q. Yes, I should like to have a copy. Do you remember how that hold was stowed—where the
1614 different kinds of general cargo were put in the hold? A. The iron cargo was underneath—in the bottom; and filled up with the other goods.

Q. You don't remember the particulars of just where each of the different kinds of general cargo were stowed? A. Oh, no, I couldn't tell that.

Q. Now, until you carried this rice you had not carried any perishable cargo at all on your ship, had you? A. Oh, yes.

Q. What perishable cargo had you carried? A.
1615 Grain.

Q. Anything else? A. Yes; general cargo out from New York to Australia.

Q. Anything else? A. We had some fodder in the No. 3 hold coming from Australia—fodder for the horses.

Q. Coming from Australia where? A. To Cape Town, South Africa.

Q. Have you carried any other perishable cargoes that you remember? A. I believe some cot-
1616 ton in No. 3 between deck coming from Norfolk, but I am not sure.

Q. Coming from Norfolk to where? A. To Hamburg.

Q. Anything else? A. I don't remember.

Q. Now, before your last voyage, the only cargoes that you think would be at all injured by water which you have carried have been general cargo from New York to Australia, fodder from Australia to Cape Town, and cotton from Norfolk to Hamburg? Is that right? A. No. Grain.

Q. Grain from Sabine Pass on the first voyage? A. Yes.

Q. On that first voyage do you know to what extent No. 3 hold was filled with grain? A. The No. 3 hold was filled with about 6 feet from the top, I believe, and then we filled it up with flour.

Q. Bag flour? A. Yes, as far as I can remember.

Q. You have not said anything about the flour before. Did you forget to mention that? A. Yes —I said we took grain and other general cargo, all kinds of cargo, and flour is included in that. 1618

Q. Where did you load that flour? A. Sabine Pass.

Q. Where did you deliver it? A. At Rotterdam.

Q. How much flour was there in the lot? A. I don't remember.

Q. 25 bags? A. Oh, quite a lot.

Q. Did you have 100 bags? A. Certainly. 1619

Q. Did you have as much as 100 bags? A. Certainly. We filled up on top of the grain with flour also. There must have been more than 100 bags.

Q. Was that in No. 3 hold? A. Yes.

Q. Who was your agent in Sabine Pass? A. The agent was Mr. Vuylsteke.

Q. Do you remember who the stevedore was in Sabine Pass? A. I think it was Flanagan.

Q. When you discharged your grain and flour from the No. 3 hold in Rotterdam was there any damage to the cargo? A. Not that I remember. 1620

Q. Are you positive there was no damage? A. I don't remember any damage in No. 3 hold.

Q. Do you remember any damage on that voyage to cargo? A. No, I don't remember.

Q. Have you any recollection upon the subject as to whether the cargo was or was not damaged on that voyage? A. No. It is so long ago I don't know.

1621 Willem Van Eyken.

Q. Now, you say you carried general cargo from New York to Australia. What did you carry in No. 3 hold—what kind of general cargo? A. I couldn't tell you that.

Q. No recollection at all? A. No. General cargo; that is all I know.

Q. What sort of general cargo was it that you carried on that voyage? A. Shoes, cigarettes, to-
1622 bacco; we had maize on board; case petroleum.

Q. All these goods were in wooden cases, weren't they? A. Except the maize. Of course, that was in sacks.

Q. Where did you carry the maize? A. I think it was in No. 4.

Q. You did not carry the maize in No. 3, did you? A. I don't think so.

Q. You say you carried fodder from Australia to Cape Town. Does that mean hay? A. Hay
1623 and bran.

Q. Was the hay in bales? A. The hay was in bales.

Q. And the bran in sacks? A. In sacks, yes.

Q. Where did you carry the hay and bran? In what part of the ship? A. There was some space left on top of the chrome ore and the coal, and we covered it with tarpaulins and some wood, and we put it on top there.

Q. Which hold was that? A. We had some in
1624 No. 2, some in No. 3, and some in No. 4—all divided for the horses.

Q. How high up in the hold was the division between the hay and bran and coal and ore? A. I think it was different in different holds.

Q. Do you remember how it was in the different holds? A. No. It must have been in some places about 9 feet below the deck—more; because the manganese ore, it was not flat out sufficient—it ran down on the side a little bit.

1625

Q. You think that, where the division was the lowest, it was 9 feet below the between decks? Is that right? A. At the very least, yes. It may be more.

Q. But in other holds the division would be higher than 9 feet below? A. Very likely. I couldn't tell just now.

Q. Do you remember in which one of the holds the division was the lowest? A. No, I don't re- 1626
member now.

Q. In trimming your ship isn't it your purpose, as a general proposition, to carry the heaviest cargo toward the centre of the vessel? A. Yes.

Q. You put the lighter cargoes in the bow and stern? A. If we can manage it, yes.

Q. If you followed that principle in that particular case, the dividing line between the fodder and the ore would be higher in holds Nos. 2 and 3 than in holds Nos. 1 and 4, wouldn't it? A. Yes, 1627
it would be so. But I don't know if it was so, because you must recollect that the superintendent told me to keep sufficient space so that it would not be necessary to carry all the food from one end of the ship to the other. So that made some dierence.

Q. What is the hight of the lower hold from the between decks to the bottom of the ship? A. I think it is about 19 feet—between 18 and 19 feet.

1628

Q. And the hight of the between decks is how much? A. It is nearly 7 feet; not quite; 6 1/2; between 6 and 7.

Q. Is the hight of the lower hold divided into nearly four equal parts by the stringer plates? A. Not quite. It leaves the space below the lowest stringer the smallest

Q. And the other three are larger and about equal? A. About. Yes. I didn't measure it, but it would be about.

1629 Q. Captain, how much is the floor of the hold above the bottom of the ship from which the draft is measured? A. The top of the ceiling, you mean? The wooden floor at the top of the ballast tanks?

Q. Yes. A. That is about—The after tanks are a little deeper than the forward tanks, I believe. There is about 4 or 5 inches difference.—
1630 In which hold do you mean—in which part of the hold, fore or aft?

Q. In both. If you know both, give both. A. I couldn't tell you to an inch, but about 5 feet, I believe; about 5 feet.

MR. KIBLIN: You said 5 feet. Is that what you mean?

Witness: Yes.

1631 Q. When your vessel is down to her marks, between which stringer plates in No. 3 hold is the level of the outside water opposite? A. Well, it would be about the first stringer.

Q. Between the highest stringer and the between deck? A. Yes, about the stringer.

Q. About even with the highest stringer? A. Yes. You mean the ship is down to her summer load-line?

Q. Yes. A. That is 23 feet 9; and the freeboard
1632 is 5 feet 9 inches, and you just take that off. It would be just about the stringer.

Q. Your freeboard is measured from the main deck, isn't it? A. No, not from the main deck. from the upper deck.

Q. Which do you call the main deck? A. Very often the between deck is called the main deck—if you speak of the main deck we mean the upper deck.

Q. When I speak of the main deck I mean the deck above the between deck space. A. Yes, that

would be it.

Q. It is from that deck that the freeboard is measured? A. Yes.

Q. And your freeboard when fully laden is 5 feet 9 inches? A. Yes.

Q. And your between deck is 7 feet high. A. Excuse me! I have made a mistake. It comes above the between deck— just above the between deck. I took the height from the between deck instead of from the upper deck. 1633 1634

Q. On your last voyage how much higher were you than if you had been loaded to your marks? A. About 2 feet when we left Singapore. I will give it to you definitely, if I look in the log. (Witness looks in log.) There is no draft in the log, because it was too high swell.—It is about 2 feet.

Q. Will you please describe the character of the cargo battens that you had in the holds of your ship? A. We had wooden boards, about 5 inches broad by 21/2 to 3 inches thick. 1635

Q. Are they laid over the frames of the ship horizontally? A. They are horizontally in the inside of the frames yes.

Q. How are they made fast to the frames? A. Made fast with screw bolts.

Q. How far apart are the battens? A. About 10 inches to a foot; about a foot.

Q. That is the distance in the clear from one batten to the next A. Yes. In some places they come nearer together. It all depends upon the form of the ship. 1636

Q. What repairs have you made in those battens since you have been on the ship? A. I don't remember that we have made any repair.

Q. Isn't the carpenter frequently repairing them when the ship is in port? A. When they are broken, yes.

Q. That is a matter that would not be reported to you? A. No. The chief officer conducts that.

1637 Q. In carrying bulk cargoes such cargoes are stowed clear to the skin of the ship beyond the cargo battens, are they not? A. Bulk cargo comes against the skin of the ship—goes between the battens.

Q. And fills up the space of 6 or 8 inches from the cargo battens to the skin of the ship? A. Yes—from 8 to 9 inches.

1638 Q. That was the fact with the manganese ore, and the chrome ore, and the kainit, and the phosphate rock, was it not? A. Yes—and the grain.

Q. And the grain.—It was true of all those cargoes was it not? A. Yes.

Q. Have you ever been in a ship that carried a cargo of rice before the present voyage? A. No.

Q. Have you ever seen rice that was said to have been damaged by sweat? A. No. That means except this voyage.

1639 Q. Yes, if that is sweat. A. Yes, except this voyage.

Q. On voyages of the *Folmina* have you seen evidences of sweat occasionally? A. Yes.

Q. What evidences have you seen? A. I saw some of the sweat hanging on to the side of the deck sometimes in the hold.

Q. The chief part of the sweat is on the under side of the between decks, isn't it, and on the under side of the main deck? A. Usually, yes.

1640 Q. You have never seen so much on the sides of the ship, have you? A. Oh, yes, very often.

Q. When you have seen sweat on the sides of a ship how has it looked? A. It looks as though the water is just hanging on it.

Q. Little drops on it? A. Yes, little drops on the side of the plating. Yes.

Q. On the side plating? A. Yes. Especially in cold weather, in the holds, if the ship is in ballast, you can see it.

Q. There will be some sweat in the holds wheth-

er you are carrying cargo or not? A. As soon as there is a difference of temperature there is condensation, and you see the sweat.

Q. When you have seen sweat in the hold have you seen any on the cargo battens? A. No.

Q. Have you seen any on the casing of the scupper pipes? A. Not on the outside.

Q. Have you had this scupper-pipe casing off since the vessel was built until a few days ago? 1642
A. No.

Q. Where you have noticed evidences of sweating previously have you ever seen such evidences on the stringer plates? A. I don't remember.

Q. Where you have seen evidences of sweating you have noticed the same appearance, and in approximately the same degree, all over the under side of the decks, haven't you? It would not be in spots here and there? A. Some spots it would be. It all depends whether there will be a little more 1643
variation or not. It is not always exactly the same; very seldom it is.

Q. How has it been on the side plating of the ship? Has it not been evidenced on the side plating all over? A. When?

Q. Where you have noticed the appearance of sweat on former voyages? A. No, it is not all over the same.

Q. What difference have you seen? A. The sun may shine on some part of the vessel, and not 1644
on the other part. That makes a difference.

Q. But have you noticed that, as matter of observation, in looking at the interior of the holds? A. Yes, very often I go down in the hold when the ship is empty.

Q. Have you ever noticed, as matter of observation, that the sweat was a good deal worse on the plating of one side than on the plating of the other? A. Yes.

Q. You have noticed that? A. Yes.

Q. And where you have found evidences of

6145 sweating you have found the same evidences in every hold of the ship, haven't you? A. It is not always. Sometimes some of the holds sweat more than the others.

Q. Aside from small differences of degree, you do find sweat in all the holds if you find the sweat at all, don't you? A. If they have been closed up in the same way, yes.

1646 Q. Have you a stowage plan of your ship on the last voyage? A. I believe the mate has one. They kept a stowage plan.

Q. Where was that plan made? A. They make it during the loading. They just note it down every time the cargo comes in. Every officer keeps his own.

Q. It is a diagram that you have now on the ship showing the stowing on the last voyage, isn't it? A. Yes.

1647 Q. Was that diagram made at the time the cargo was being loaded? A. They always load it down, as matter of fact, and the mate has given me some items now and then.

MR. BROWN: I call for its production.

WITNESS: I want to state that I don't know anything about that—whether the mate took it away with him or not. Of course, if it is on board, it will be produced.

MR. KIRLIN: Do you know where it is.

1648 WITNESS: No. He must have destroyed it, because he thinks the voyage is finished; but, if it is on board of the ship, we will produce it.

MR. KIRLIN: There is not any issue, is there, about where the rice was stowed?

MR. BROWN: No.

Q. On your last voyage your No. 3 hold was entirely filled with rice? A. Yes.

Q. What did you have in No. 2 hold? A. We

had manganese ore in No. 2 hold and tin.

Q. Tin ore? A. Tin in slats.

MR. KIRLIN: Slab tin?

WITNESS: Slabs—blocks.

Q, Block tin? A. Yes, slats we call it.

Q. Anything else? A. And hides and wool, and I filled up with some other cargo. 1650

Q. In what part of the hold were the hides stowed? A. I believe they were stowed fore and aft.

Q. Were they stowed at the top or bottom? A. Some of the hides were probably stowed on top of the ore, and some on top of the tin. I believe they restowed them afterwards; I don't recollect exactly.

Q. What cargo did you have immediately under the between-decks in No. 2? A. Some of the 1651 hides, and some of the bales in the after part, I believe.

Q. Bales of wool? A. Bales of wool, and hides; hemp was in there, too, I believe.

Q. Did you have any tea in No. 2? A. No.

Q What was stowed on the sides of the ship next the cargo battens in No. 2? A. I don't know exactly what was put on the sides, because I was not there when they filled up the between-decks.

Q. I am not speaking now of the between-decks. I am speaking of No. 2 lower hold on the sides of 1652 the ship. A. There must have been some of the hides and the bales too.

Q. The hides and the wool. How low down from the between-decks did the hides and wool extend? A. I don't know.

Q. What did you carry in No. 1? A. We carried some hides and wool, and blocks of tin, and coffee, and tapioca, and filled up with other stuff.

Q. The hides and wool were in bales? A. Yes, made up in bales.

1653 Willem Van Eyken.

Q. The coffee and tapioca in bags? A. In bags, yes.

Q. In what part of No. 1 were those different kinds of cargo stowed? A. The bales of wool and hides were in the fore part, and the tin and coffee and tapioca and other stuff in the after part, of No. 1 hold.

1654 Q. Which kind of cargo was under the between decks in No. 1? A. We filled it up with other cargo.

Q. There was none of the tin under the between decks? A. Oh, no.

Q. The tin was on the bottom? A. Yes.

Q. Then you had under the between decks either tapioca, hides, or wool, or coffee? A. Yes.

Q. And how about the sides of the ship and the wings? A. The cargo was just stowed square over.

1655 Q. How much tin did you have in No. 1? A. I don't know exactly. About 200 tons maybe.

Q. How much manganese ore did you have in No. 2? A. I think about from 700 to 800 tons, I believe.

Q. What did you carry in No. 4? A. We had manganese ore in the bottom.

Q. How much of that? A. Just the remainder of the whole lot. I don't know exactly. Something about 200 tons or so.

1656 Q. 200 tons? A. About.

Q. What else in No. 4? A. Tea, and tapioca, too.

Q. Anything else besides manganese ore, tea and tapioca in No. 4? A. I think it was filled up with tapioca, yes.

Q. Do you know how much tapioca you carried in No. 4? A. No.

Q. How much tea? A. I think it was 500 tons.

1657

Q. Was the greater part of the space of No. 4 taken up with tapioca? A. No. with tea.

Q. In what form was the tea carried? A. Just stowed in the usual way.

Q. Was the tea in bags, or boxes, or cases, or what? A. In boxes.

Q. Wooden cases? A. Yes, with matting around it—just in the usual way that tea is shipped.

1658

Q. Which cargo went next the sides of the ship in No. 4? A. It was all square over, stowed from one side to the other.

Q. You put in first ore, making it level? A. Yes.

Q. And then tea on top of that? A. In the between deck we had some wood and also the shifting boards with the floor.

Q. And then what went on top of them? A. Tea.

1659

Q. And then tapioca on top of the tea? Is that right? A. No. The tea was stowed more vertical —more separate—than the tapioca; and there was some tin in too; we had blocks of tin in No. 4 too; we put them on top of the manganese ore between the tea, and then on top of that we stowed the tapioca.

Mr. Kiblin: Don't use "blocks of tin." Block tin?

1660

(Witness.) Block tin. It is noted on the boat note "slabs of tin."

Q. Was the separation between the tapioca and the tea a horizontal plane? A. No, it is vertical.

Q. Vertical? A. Yes.

Q. And was the tea stowed forward of the tapioca? A. Fore and aft.

Q. The division was fore and aft? A. Yes.

Q. So that you carried the tapioca on one side

of the ship and the tea on the other side? A. No. I don't mean that. I mean the tea was stowed in the fore part of the hold, and the after part, and in between them the tapioca follows between the tea —between the tea.

Q. Between the two lots of tea the tapioca was stowed? A. Yes.

1662 Q. My question had reference to the lower hold in No. 4. A. Yes.

Q. Then the forward portion of No. 4 was tea, and the after portion was tea? A. Yes.

Q. And the central portion was tapioca? A. Yes.

Q. And those three lots extended clear from one wing to the other wing? A. Yes.

Q. Was there any cargo damaged by sweating in Nos. 1, 2 and 4 lower holds? A. There was some of the pepper in No. 2—some bags were dam-

1663 aged by sweat; yes. So it was reported to me.

Q. To whom was the pepper consigned? A. I don't know.

Q. Your manifest will show, will it not? A. Yes.

Q. Haven't you a copy of your manifest? A. I don't have it on board of my ship; I have given all my papers to Mr. Barber.

MR. BROWN: I call for the production

1664 of the manifest.

Q. Was all the pepper you carried on board consigned to one person? A. I don't know. I don't think so, but I don't know.

Q. You say the pepper was reported sweat damaged? Yes.

Q. Who made the report of sweat damage to the pepper? A. The chief officer and the third officer.

Q. Did you see the pepper yourself? A. I saw

some of the bags when they were on the pier—not in the hold.

Q. Was the pepper carried in bags? A. Yes.

Q. The pepper was unground? A. I think so, yes.

Q. You say you saw some in bags? A. Yes.

Q. How did they look? A. They looked badly stained outside—dampy.

Q. Were they damp? A. Dampy. 1666

Q. What was the color of the stain? A. It was just a little bit darker than the bag itself.

Q. How many bags were stained? A. I didn't count them.

Q. How many bags were reported stained? A. I remember there was about 6 or 8 bags; I am not sure.

Q. Did you see where those bags were stowed? A. I didn't see that. They were out of the ship before they told me. 1667

Q. How many bags of pepper did you carry? A. I don't know.

Q. How high does the casing on the scupper pipes extend in the lower hold? A. Up to the between decks.

Q. Does the casing come in contact with the between decks at the upper end, or is there a small crack? A. I think it is just up to the between decks. There may be a little space, but I don't know. 1668

Q. Captain, do you have cargo battens in the between decks just the same as in the lower holds? A. Yes.

Q. Were these four ore cargoes, the manganese, the chrome, the kainit, and the phosphate, carried in the No. 3 between decks as well as in the lower holds? A. The managese ore from Poti to Baltimore was carried in the between deck too. So was the Kainit.

Q. The chrome? A. The chrome was not.

1669 Q. The phosphate? A. No.

Q. What did you carry in No. 3 between decks at the time you were carrying phosphate rock? A. Rosin.

Q. On your last voyage there was absolutely no damage to cargo excepting the damage to the rice and this trifling damage to the pepper that you have mentioned? Is that correct? A. That
1670 is all that was reported to me.

Q. That is all that you know anything about? A. Yes.

Q. Does the between decks scupper pipe pass through the between decks to the floor of the between decks? A. Yes. Because otherwise there could be no draining. There is a hole cut into the between deck, and the pipe is fastened into—

Q. How does the upper edge of the pipe compare in elevation to the floor of the between decks?
1671 A. It is just a little bit below, but there is a grating on top.

Q. How much below the floor of the between decks? A. I don't know exactly. Only a trifle.

Q. 1/16 of an inch? A. Maybe. It can't be much, because there would only be the difference of the plate.

Q. This grating is circular? A. Yes, circular hole.

Q. And fits into a round hole? A. Yes.

1672 Q. The grating is moveable? A. No; it is permanent there.

Q. Is it soldered to the scupper pipe or to the between decks? A. I didn't examine that.

Q. Don't you know how it is? A. I didn't examine that.

Q. Do you know how it is? A. I didn't examine it; so I couldn't give an explanation. I think so. I think it is fastened to the between deck, but I could not say.

Q. Do you know whether the upper end of the

scupper pipe fits tight into the hole in the between decks or not? A. Yes; it must be, or it would leak.

Q. Have you tested that to see how tight it fits? A. Yes. I threw water in the between deck, and there was no water went down the pipe at all. So it must be very tight.

Q. What is the purpose of the casing around the scupper pipe in the lower hold? A. To protect from the cargo; so it should not be damaged by the cargo; especially where you take cargo in bulk. 1674

Q. Isn't the purpose of that casing to prevent perishable cargo from being damaged by any tricklyiny water that may pass between the outside circumference of the scupper pipe in the between decks and the between decks itself, and run down on the exterior surface of the scupper pipe? A. I don't think so. Because we use dunnage for that purpose. The main purpose is to protect it so it could not be damaged by cargo. It is in good condition when the ship is new, and its purpose is that it should remain in the same condition. 1675

Q. If a small quantity of water should run down from the between decks on the exterior surface of the scupper pipe, the casing would accomplish the object of preventing the cargo from being damaged by that water, would it not? A. No. Because the casing is not water-tight. 1676

Q. How large is the casing? A. The casing, I think, is about 8 inches; 8 by 8; about.

Q. Is that outside measurement or inside measurement? A. I don't know exactly. It is only an inch or so difference.

Q. What is the diameter of the scupper pipe? A. I don't know. I think it is about 3 inches; 2 1/2 inches at the utmost.

Q. Now, if any water were to run down on

1677 the outside of that scupper pipe and inside the casing, it would find its way to the bilges, would it not? A. No. It would find its way to the bottom—the water that runs down on the outside.

Q. The outside surface of the pipe? A. Would come down on the bottom of the ship—I mean the bottom of the ceiling.

Q. Where does the casing terminate at its lower
1678 end? A. Near the ceiling.

Q. Above the ceiling or below it? A. Against the ceiling—as far as the ceiling runs to.

Q. Is there any opening through the ceiling to permit the casing to run through it? A. Yes. It is cemented.

Q. Then the casing passes through the ceiling into the bilges? A. Not the casing. The pipe.

Q. I am speaking now of the casing? A. It is just on the outside. It runs through nothing.

1679 Q. Where is the lower end of the casing situated? A. It goes down to as far as the ceiling of the hold.

Q. Does it touch the ceiling? A. No.

Q. Does it pass through the ceiling or below it? A. No; it does not pass through; it is against it.

Q. How large a hole is cut in the ceiling near the lower end of the casing? A. There is just sufficient space to let the pipe pass through; and
1680 it is cemented.

Q. 2½ in diameter? A. Just sufficient space for the pipe.

Q. Then you have some cement there to keep the pipe from working? A. Yes, and to make it tight;—that if you should take cargo in bulk. anl some should run into the casing, it would not go down into the bilges.

Q. Now. if any water ran down on the exterior surface of that pipe, it would drop on to the ceiling? A. Yes.

Q. Near where the pipe runs through the ceiling? A. Yes.

Q. And then it would run between the dunnage under the cargo? A. Yes.

Q. And until it found its way into the bilges, would it not? A. Then it would leak through the ceiling to—

Q. It would leak through the ceiling? A. No.

Q. Aren't there little openings in the ceiling— 1682
places to let water go through to the bilges? A. No.

Q. It would eventually leak through the ceiling? A. It may be. If the ceiling was not tight it would run through.

Q. What is that ceiling made of? A. Wood.

Q. Tongued and grooved boards? A. I think about 3-inch boards.

Q. 3-inch boards? A. Yes.

Q. Not tongued or grooved? A. No. 1683

Q. Then there are cracks everywhere? A. Seams, yes.

Q. Now, if the water should flow down on the exterior surface of that pipe, it would follow the course I have indicated only in case the space inside the casing were free? Isn't that true? A. I don't follow the question.

(Question repeated.) A. The water would run down with the pipe in any case.

Q. Now, Captain, suppose the space inside the 1684
casing and between the casing and the outside of the scupper pipe were filled solid with some material to a considerable extent impervious to water, the water would accumulate in the casing until it ran out through the seams or cracks in the casing itself, wouldn't it? A. Yes.

Q. Now. the fact is that at the close of your last voyage the insile of that casing was clogged with some stuff that looked like grain, or dirt

and dust? Isn't that so? A. Some of it; on the lower part.

Q. It was stuffed full of it, was it not? A. No. I didn't see it. I asked the officer if it had been full up, if it had been quite filled up, and he said no.

Q. Were you there when the casing was taken off? A. No. I was there afterwards.

1686 Q. Captain, didn't you go down into the hold, at the request of Captain Salter, who is sitting here, for the purpose of seeing the casing taken off, and didn't you find it filled up with dirt and dust and grain? A. I don't recollect if it was this gentleman. I have been down in the hold with two gentlemen that came on board a long time after the ship was discharged.

Q. Didn't you go down into the lower hold to see the casing taken off at the request of some

1687 gentleman not connected with your ship? A. He didn't ask me to see the casing taken off.

Q. Didn't Captain Salter come to you in your cabin and ask your permission to take off the casing? A. I don't remember.

Q. Didn't some person do that? A. They didn't ask my permission. "

Q. You say no one asked your permission to take off the casing? A. I don't remember that anybody asked me permission to take off the

1688 casing.

Q. Didn't some person come to you in your cabin and speak to you of an intention to take off the casing? A. It may be; I don't remember.

Q. And didn't that same person request you to go down anl see the casing taken off? A. No. I don't recollect that. There was nobody asked me to see the casing taken off. Nobody has done it—to see the casing taken off.

Q. Did you ever see Captain Salter before you

saw him at Mr. Kirlin's office? A. I think I saw the gentlemen, yes. 1689

Q. Where have you seen him before? A. I don't remember exactly.

Q. Haven't you seen him on your ship? A. I think so, yes.

Q. Didn't he come to your cabin and say something to you about the casing? A. I don't remember. 1690

Q. Do you swear positively that in response to Captain Salter's request, you did not go down into the hold and see that casing taken off? A. I didn't see it taken off. When I came in the hold the casing was open in the lower part.

Q. Was it in its position around the scupper pipe at that time? A. No. Some of the plank—I don't think it was all open, but some of it was open.

Q. Some of the planks had been taken off? A. Yes. 1691

Q. And the other three planks composing the casing were still there around the pipe? A. Some of it, I think.

Q. How many planks had been taken off when you went down there? A. I don't know.

Q. How high up from the floor of the hold had the planks been taken off? A. I couldn't say. I only saw the pipe there, but didn't take note of how many planks were off.

Q. Was the plank taken off from the casing higher than the lowest stringer plate? A. I don't know; I don't recollect. I only recollect I saw the pipe just above where it goes to the ceiling, and saw some of the dust and dirt and may be grain—it loked like grain; I saw that there. 1692

Q. When you went down into the hold and saw the planks, or certain planks, of the casing off, who was there at the time? A. I don't recollect exactly.

Q. Was not Captain Salter there at the time?

A. No, that is just what I can't say. I don't know whether I saw this gentlemen in the cabin or down below; I couldn't remember.

Q. How many persons were there? A. There were two gentlemen there when I was there.

Q. There were only two besides yourself? A. Yes. There was a sailor down there, too.

Q. One of your crew? A. Yes.

1694 Q. Who was he? A. I don't know. I don't know where he is now. A couple of days ago I paid him off.

Q. He has left the ship? A. A couple of days ago—last Saturday.

Q. Do you know what has become of him? A. No. He may be here yet.

Q. Can't you say whether the pipe was exposed to view above the lowest stringer plate? A. No, I don't recollect.

1692 Q. How high up from the ceiling that composes the floor do you remember that pipe was exposed to view? A. I don't know. I just saw the pipe may be a foot or so or a little bit more.

Q. You don't remember whether it was exposed to view above the ceiling of the deck? A. About a foot probably; a little more than that. I didn't take particular notice.

Q. Will you swear positively it was not exposed to view for 15 feet above the floor of the ship? A. I couldn't swear that, because I didn't

1696 take positive notice of it. I just was looking at that stuff.

Q. Will you swear positively as to whether or not it was taken off all the way up to the between decks? A. I wouldn't swear it was, because I didn't take notice of it.

Q. You preferred not to look at it, didn't you? A. I don't say that.

Q. How did you happen to go down in the hold at all at that time? A. Somoe time after we were discharged and we were lying there two gentlemen

came to me and asked for an inspection of No. 3 hold, and asked me if I would go down.

Q. Asked you to go down? A. Yes.

Q. And then you went down? A. Yes.

Q. And you found the plank already off when you got down? Is that what you have testified? A. Yes.

Q. And you only looked at the lowest one foot of the pipe? A. That is all that I remember. 1698

Q. And you saw some at ivet stuff there—some dust and dirt and grain? A. Dirt; stuff; dampy.

Q. It was dampy? A. Yes.

Q. Cling to your hand? When you take it up it will cling to your hand? A. No. It felt a little dampy, but not so far as to stick.

Q. When you squeeze it in your fingers will it not leave a mark on your fingers? A. I don't know. I didn't try it. I just took some out and held it like that! (Witness indicating.)

1699

Q. Isn't it a fact, captain, that you cannot ac-member that Captain Salter raised himself by stepping up to the lowest stringer plate, and, reaching as high as he could from there, took out from the interior of the casing a mass of this wet stuff, or dampy stuff, grain, dust, &c.; and didn't he then turn to you, and show it to you, and ask you how you could account for that? A. I don't remember.

Q. You have no recollection on that subject? A. I don't remember. 1700

Q. Will you swear that did not occur? A. I would not swear, as I do not recollect.

Q. And didn't you state to Captain Salter at that time that you could not account for it? A. I don't recollect at all. Because I didn't take so much notice of it I only thought it was a survey that had not much to do with me, because I was perfectly sure everything was tight.

Q. Now, captain, on that occasion don't you re-count in your own mind for the condition of things

1701 you saw there at that time when you went into the hold with Captain Salter? A. I can't tell you the particulars of anything on board that I didn't see —I can't tell you exactly how many planks were broken off.

Q. Can't you tell me the length of t he pipe that was uncovered and exposed to view by the taking off of the planks that formed that casing?

1702 A. No; I didn't take much notice of that.

Q. Can't you tell whether it was one foot or twenty feet? A. It wouldn't be twenty feet, because the pipe is not twenty feet long, I think.

Q. Within that limit you can't tell anything about it? A. I didn't take particular notice of it at all. That is the reason I don't remember all these things for sure.

Q. Did you take any notice, particular or otherwise? A. I took notice there was some dust and

1703 dirt stuff, and it looked to me like grain, and it was around the bottom of the pipe.

Q. And you only took notice of one foot? A. Yes. I didn't take particular notice of the other at all.

Q. You knew that you were asked to go down into that hold to see the condition of things pointed out to you by these two gentlemen, didn't you? A. No. They asked me if they could look at the hold, and asked me to go down with them.

1704 Q. You knew they asked you to go down with them for the purpose of seeing the condition of things that existed there, didn't you? A. Yes.

Q. And then you went down, and would not look? Is that what you did? A. Not that I would not look. All I remember is that I saw the lower end of the pipe, and saw some dirt there.

Q. Do you now testify you did look, but you do not remember what you saw? A. I only saw what I say now and what I recollect.

Q. Answer the question. Do you testify you

went and looked, but now swear you do not recollect what you saw? A. I testify I looked, but only recollect that I saw some dirt underneath the pipe.

Q. You did examine the condition of the pipe, then, as far as it was exposed? A. Yes.

Q. And the condition of the casing? A. I just looked at it.

Q. But you can't remember what you saw? A. 1706
Not quite well, because I didn't take sufficient interest.

Q. You don't remember well enough to tell us how much of that pipe you examined? A. No. I didn't take much notice of it.

Q. You knew that that cargo had sustained very serious damage, didn't you? A. Yes, a lot of bags damaged.

Q. You knew it was a very important thing for the ship to establish the cause of that damage, 1707
didn't you? A. Yes.

Q. And yet you do not remember what you saw down in that hold at that time? A. No. Because I had been down in that hold and knew all about it, and the between-decks; and didn't take much notice there.

Q. Had you been down before when the casing was off? A. Yes; some on top.

Q. Do you intend now to testify that before these two gentlemen came on your ship you had taken 1708
that casing off or any part of it? A. I think the upper part I saw taken off. That is all I recollect.

Q. Do you swear that positively? A. No; I don't remember quite well; I would not swear to it; but that is what I think.

Q. Do you swear positively that before these two gentlemen came on board your ship any part of that casing had been taken off? A. No, I couldn't swear to that.

1709 Q. You have no recollection on that subject either? A. No.

Q. Now, you testified that upon this your first opportunity of finding out the cause of that serious damage, so far as an examination of the casing would enable you to do so, you cannot remember what you saw?

1710 MR. KIRLIN: I object to that. The captain has not testified that this was the first opportunity he had of ascertaining the cause of the damage.

A. I only can testify that I examined the pipe, but I don't know exactly on what occasion—whether it was before or after the gentlemen were there. But I tstify that I at some time looked at it, and ordered somebody to pour water through it. But I couldn't tell for a certainty exactly what
1711 day it was—whether it was before or after this gentleman was on board the ship.

Q. Did you at any time examine the interior of the casing, excepting in respect of the lowest one foot, so far as you remember? A. Yes.

Q. What other examination did you make? A. I looked at it, and I saw that it was not filled up quite to the top at all, and only saw some on the bottom; and there was a little bit of dirt somewhere half way, I think, as far as I recollect.

1712 Q. Now you testify that you think the dirt and stuff, grain and dust, and so on, extended about half way from the ceiling to the between-decks in the casing? Is that right? A. No.

Q. What is not right? What do you testify? A. I saw some of the dirt just below where it goes through the ceiling, and I saw some dirt somewhere above the stringer.

Q. Which stringer? A. I think it was the lowest stringer.

Q. Didn't you see any of this wet or dampy

stuff above the second stringer? A. Yes, I saw some of that there too, now I remember well. Because there is a small piece of wood to steady the pipe, and just on top of that small piece of wood there was just a little bit of the same stuff that was down below. 1713

Q. Where was that? A. I believe that was the second stringer.

MR. KIRLIN: A small piece of wood inside the casing? 1714

(Witness.) Inside the casing, to steady the pipe; and just on top there there was some of that dirt accumulated.

Q. How high up did that dirt extend, as far as you know? A. It was very little. I think you could have taken it out with two or three handsful or so—three or four handsful.

Q. Isn't it a fact that when Captain Salter stepped up on to the lowest stringer plate and handed you down a handful of this wet, or, as you call it, dampy stuff, and asked you to account for it, he then afterwards asked you to step up where he was and see for yourself? Don't you remember that? A. It may be, but I don't remember it. 1715

Q. You won't swear whether that is true or false? A. I couldn't say that, no.

Q. You didn't get up there to examine it, did you? A. I don't remember if I went up. I don't think so. But I have been up some time, before or after; I know that. 1716

Q. Don't you know that you wouldn't get up there to examine that in Captain Salter's presence? A. I don't remember that it was asked me to go up there.

Q. Isn't it a fact that that casing was filled up solid with this wet or dampy stuff clear from the ceiling up to above the second stringer plate?

1717 Will you swear positively whether that was true or false? A. I will swear positively that I did not find it there.

Q. When did you look for it and fail to find it? A. I couldn't say whether I looked after the gentlemen had been there or before.

Q. You think probably, after they left and had
1718 removed the dampy stuff, then you looked and did not find it? Is that it?

MR. KIRLIN: There is no testimony that they removed anything. I object to that.

A. I don't think that.

Q. There was a time, whether before or after Captain Salter went there, that you looked for this dampy stuff in the casing, and you failed to find some lower than the second stringer? Is that what
1719 you testified? A. I didn't say that.

Q. Correct me. State the fact. A. I stated that I found some of the dirt I think about the second stringer on that piece of wood that is there to steady the pipe.

Q. That is not an answer to the question at all. I am trying to get at the facts as to whether, from a position above the second stringer clear down to the floor or ceiling of the hold, it had been solid chock-a-block full of this dirt and stuff? A. I am
1720 nearly sure it was not. When I was there it was not so.

Q. How can you be sure it was not? A. I can show this: Because, as I say, above the second stringer there is a piece of wood that steadies the pipe, and some of the dirt was accumulated on top of that. It couldn't be just underneath.

Q. Why not? A. Because there is a stringer against, and there is a piece of wood in.

Q. You think it probable it would not be? A. I

didn't see it; and, according to what I saw, it could not be there.

Q. When did you make that examination, as near as you can fix it, upon which occasion you found that the dirt and stuff was not in position underneath the piece of wood that steadied the pipe? A. Sometime before or after this gentleman came; I couldn't say which.

Q. Place that time within limits as nearly as you can? A. A couple of days before, or a couple of days after, this gentleman was there, may be.

Q. You think it was within two days, one way or the other? A. Yes.

Q. It was before or after their coming? A. Two or three days, yes; I don't know exactly.

Q. Captain, on the voyage from Japan and China to New York this last time you had good weather on the whole, did you not? A. On the voyage from Japan to New York.

Q. The last voyage coming to New York? A. We had several days stormy weather; some days stormy weather.

Q. But, describing the voyage as a whole, it was a smooth voyage, was it not? A. The voyage from Singapore to Port Said I believe was very smooth.

Q. Taking the voyage as a whole it was a smooth voyage? A. It was not a smooth voyage on the Atlantic—the North Atlantic.

Q. You crossed the Atlantic in about the smoothest month of the year, didn't you? A. I don't think so.

Q. About the month that is usually the smoothest of the year? April and May? A. Well, you can have it very rough in the latter part of April.

Q. When did you pass Gibraltar? A. (Witness looks in log.) In the afternoon of the 21st of April.

Q. Didn't you tell Captain Salter that you had

1725 had moderate weather on that voyage, and no water to account for the condition of the cargo of rice? A. I don't recollect.

Q. Will you swear positipely whether you said that or did not say it? A. I don't recollect that I said it.

Q. Do you remember talking about the weather on your voyage to Captain Salter? A. No, I do
1726 not.

Q. Do you remember talking about the weather to either of the two gentlemen who came on board at the time you have testified to? A. I don't know if we talked about the weather; I don't recollect about that.

Q. Don't you remember saying to Captain Salter that you did not have your hatches on enough of the time to account for any great amount of sweat? A. No, I don't recollect that at all.

1727 Q. Will you swear positively whether you said that or did not? A. I don't remember that I said it.

Q. You might have said it? A. I don't know. I don't think so, becauses we had the hatches on several days.

Q. How many days did you have the hatches on? A. In the North Atlantic several days. The log book will show.

Q. How many days did you have the hatches
1728 on? A. I don't know.

Q. Does the log book show every day when the hatches are on? A. It shows when they are open. You can see by the weather.

Q. Just examine your log book, and tell us just what days the hatches were on? A. (Witness looks in log.) Do you want when we started after we left Algiers, or do you want the whole trip?

Q. I want the whole trip. When were the hatches on after you loaded the rice—after you had

it on board? A. We had the hatches on on the voyage from Kobe to Moji.

Q. Give the dates and the number of hours that the hatches were on right straight through, if you can? A. He put the hatches on after the cargo was aboard in Kobe. It was in the evening of the 5th of February.

Q. On the 5th of February how many hours did you have the hatches on? A. Every hour is 1730 not put down.

Q. How many hours as near as you can tell, did you have the hatches on, using the log book to assist your memory? A. It was about 8 in the evening 7.30.

Q. Give the result? A. About 8 o'clock. 4 hours that night.

Q. 4 hours, hatches on, that day. Any other time the hatches were on? A. There was bad weather the next day; we kept on the hatches. 1731

Q. What day? A. The next day was bad weather—stormy weather.

Q. Hatches on how long? A. It is not put down. We never put in the log book how many hours.

Q. I am not asking you what the log book says; I ask you to tell the fact as nearly as you can with the assistance of the log book? A. I can't tell how many hours.

Q. You can't tell whether it was one hour or 1732 twenty-four hours the following day? Is that right? A. I can't tell. The next day the hatches were on, though.

Q. Do you mean for one hour or for twenty-four hours? A. The next day, the whole day.

Q. Were they on for twenty-four hours on that day? A. The next day. That is the whole day. Yes.

Q. Were they on any other day? A. The 7th of February was the next day. The hatches were on.

Q. On the 7th of February how many hours were the hatches on? A. The whole day.

Q. All day—24 hours? A. Yes, squally weather.

Q. Go on? A. The next day; hatches on.

Q. Give the date? A. 8th of February. Taking in bunker coal

Q. February 8th the hatches were on all day?

1734 A. Yes.

Q. 24 hours? A. Yes.—the next day, the 9th of February; hatches on.

Q. All day? A. Yes.

Q. Give the length of time on each day. If you mean all day say all day. If you mean one hour say one hour? A. If I call it the day, it is the whole day. If there is any specific time I will say so.

Q. I prefer you should, simply to save time and

1735 save my asking you. A. 10th of February: hatches on. 11th: hatches on.

Q. The 10th of February how many hours, hatches on? A. Hatches on the whole day.

Q. The 11th of February how many hours, hatches on? A. The whole day.—12th of February, the whole day, hatches on; 13th of February, the whole day, hatches on; 14th of February, half a day, hatches on; 15th of February, the hatches were off.

1736 Q. Just give the dates when you had the hatches on. Don't give the dates when they were off? A. February 20th, half day, hatches on; February 21st, hatches on.

Q. How many hours that day did you have the hatches on? A. Half a day.—February 23rd, half a day, hatches on; February 28th, whole day, hatches on; March 1st, half a day, hatches on; March 7th, half a day, hatches on; March 11th, whole day, hatches on; March 12th, whole day, hatches on; March 14th, half a day, hatches on;

March 15th, half a day, hatches on; March 16th, half a day, hatches on; March 17th, half a day, hatches on; April 8th, whole day, hatches on; April 14th, half a day, hatches on; April 15th, whole day, hatches on; April 19th, half a day, hatches on; April 22nd, whole day, hatches on; April 23rd, whole day, hatches on; April 24th, whole day, hatches on; April 25th, whole day, hatches on; April 26th, half a 1738
day, hatches on; April 29th, whole day, hatches on; April 30th, whole day, hatches on; May 1st, whole day, hatches on; May 2nd, whole day, hatches on; May 4th, half day, hatches on; May 5th, whole day, hatches on; May 6th, whole day, hatches on; May 7th, half a day, hatches on; May 9th, half a day, hatches on.

Q. At all other times than those you have mentioned the hatches were off? A. Yes.

Q. Isn't it a fact that, from the length of time 1739
that the hatches were off, there would be very little sweating of cargo to be anticipated? A. Yes, I believe that, because we have the hatches off as much as possible, and the sweat did not accumulate so much underneath the deck.

Q. In your opinion, that rice was thoroughly ventilated throughout from wing to wing, was it not? A. Yes.

Q. Now, a well-ventilated cargo, where the hatches were off for a considerable portion of the 1740
time, won't sweat to amount to anything, will it? A. It may heat. The nature of the goods may do that. Rice very often generates heat.

Q. That happens when the goods are damp or in an improper condition when loaded, doesn't it? A. You can't always see. You may load in their proper condition, if you see it, and still it heats when it comes into a working ship—to heat in the ship.

Q. How do you compare rice with hides and

1741 wool in respect to their heating? A. I think rice heats more. That is the reason they have taken more precautions for ventilation too.

A. In the statements that you now make about the heating of rice do you judge from your own experience in handling rice, namely, your experience on the last voyage? A. No. This I have heard from other captains who are accustomed to
1742 carry rice, and I have been reading in some books about cargoes.

Q. Then you are not speaking from your own experience at all? A. No; I have never carried rice before this cargo.

Q. Isn't it a fact that a well-ventilated cargo, where the hatches are off a good part of the time, will not heat very much? A. But rice, you can't say. You will find cargoes of rice are heated very often although they are ventilated.

1743 Q. It isn't near so likely to heat where the ventilation is good as where it is not good? A. That is a fact. If you had no ventilation it would be worse.

Q. Now, didn't you tell Captain Salter that you had your hatches off so much of the time that you could not account for the damaged condition of the cargo on the theory of sweat? A. I don't recollect it. I can't remember any such thing at all.

1744 Q. You won't swear positively that you did not say that? A. I couldn't recollect. That is all that I can say. I don't recollect if I said it to this gentleman.

Q. At this interview which you say you had with two gentlemen, and at whose request you went down in the hold, didn't Captain Salter call your attention to the wet condition of the dunnage on the second stringer plate? A. I don't think so. Because when we went down the hold, as far as I recollect, with those two gentlemen (I don't

know if this gentleman was there), the most of the dunnage was taken out of the stringer.

Q. Will you swear positively as to whether any of the dunnage had or had not been been moved at the time of your interview with these two gentlemen? A. I will only say this: That those two gentlemen I am talking about that I have been in the hold with—I don't know whether this gentlemen was there, it may be two other ones, but I don't recollect that I saw this gentleman in the hold—all the time you are speaking about this gentleman I am thinking of these two gentleman I have been down there with, but I don't know whether this gentleman was down.

Q. At the time you had the interview with the two gentlemen you refer to, will you swear positively whether or not any of the dunnage was moved? A. Some of the dunnage was moved. I will swear to that.

Q. Was not the dunnage you referred to which had been moved only such dunnage as the stevedores necessarily take out with the cargo? A. There was some more moved too—more than was necessary to take out the cargo.

Q. Had any dunnage at that time been moved by the ship's crew? A. I couldn't tell that. I was not down in the hold all the time.

Q. Had you given orders yourself to have any of it moved out of the hold at that time? A. I didn't give orders. But it may have been done without my orders, because it is the officers' duty.

Q. You don't know whether, in fact, any of it had been moved by the crew or not? A. No.

Q. You say you don't know whether Captain Salter was one of the two gentlemen who came to you at that time? A. No.

Q. You don't recognize him? A. Not that he was there. I have seen this gentleman. but I can't

say where and on what occasion. I don't remember.

Q. You don't remember you have seen Captain Salter? A. I remember I have seen the gentleman, but I don't know whether I have seen him in the cabin, or on deck, or in the hold.

Q. You remember you have seen this gentleman? A. I have seen him at some time, but I
1750 don't know exactly where.

Q. Don't you remember you have seen him on board the ship? A. Yes, I think I have seen him on board the ship, but I don't remember on what occasion.

Q. You don't recollect whether he came alone or with somebody else? A. No.

Q. You won't swear positively whether he was one of those two or not? A. No, I could not.

Q. He may have been, and may not have been?
1751 A. He may have been, and may not have been.

Q. Have you had any conversation with any persons representing the interests of cargo with respect to the cause of the damage to the rice excepting those two gentlemen that you refer to and Captain Salter?

MR. KIRLIN: We don't know that those two gentlemen referred to represented cargo, so far as the evidence appears.

1752 MR. BROWN: Strike out "representing cargo."

MR. KIRLIN: Don't strike it out.

MR. BROWN: I will withdraw the question.

Question withdrawn.

Q. Have you had any conversation with any persons acting in the interests of cargo with respect to the cause of the damage to the rice excepting those two gentlemen that you refer to and

Captain Salter? A. I couldn't say, because I don't remember that any one was represented to me as being for the interests of the cargo. 1753

Q. Do you remember any persons coming on board your ship and examining into the causes of the damage to the rice, or talking with you about the cause of the damage to the rice, except Captain Salter and the two gentlemen you have previously referred to, and except your officers, agents and persons in the employ of the ship's agents? A. No, I don't recollect. 1754

Q. Including your counsel? A. I don't remember.

Q. You don't remember of anybody else? A. No.

Q. Now, at your interview with these gentlemen did not one of them stand up on the second stringer plate, and lift considerable dunnage out of the groove in that plate, and hand it down to the second of the two gentlemen, and didn't the second of the two gentlemen pass the dunnage to you for your inspection? A. I don't remember. 1755

Q. You don't remember whether that happened or did not happen? A. No.

Q. Did not the gentleman that passed the dunnage to you ask you how you acounted for its being so wet, and whether that looked to you like sweat, and why it was not like that on the other side of the ship? A. No, I don't remember that such questions were put to me. 1756

Q. But you won't swear that it was not? A. He may have said so, but I didn't hear it; for I don't remember at all.

Q. Will you swear whether or not you heard that question asked? A. I don't remember that I heard that. I will swear to that.

Q. You won't swear you did not hear it, but only that you do not remember? A. I only remember that I do not remember.

1757 Q. Will you swear you did not hear it, or do you swear you do not remember it, which? A. I will swear I don't remember that any such question was put to me.

Q. Answer my question. I asked you whether you will swear to not having heard that question? A. I will swear I do not remember having heard this question.

1758 Question repeated. A. I only can swear that I don't remember.

Q. Whether you heard it or not? A. Yes.

..Q. Don't you remember any dunnage or mats being submitted to your inspection by any person outside of the ship after being thrown down at your feet? A. No, I don't remember.

Q. You won't swear whether that occurred or not? A. I only swear that I don't remember it.

Q. Don't you remember one of the two gentle-
1759 men who came on board your ship addressing you and asking you whether you did not consider the dunnage to be wet? A. No, I don't remember that. I only recollect that the two gentlemen I saw (I don't know whether this gentleman was there) that asked me to come down in the hold, when they left the ship they said they could find nothing—they could find no leak.

Q. Did both of them say that, or only one? A. I think one said it.

1760 Q. Who was he? A. It was one of the gentlemen said it.

Q. You don't know their names? A. No. They didn't introduce themselves by their names.

Q. Do you remember anything else they said to you, or that either of them said to you? A. No. Because the time I was in the hold I didn't take very much notice of it, because I was very sure there was no leakage. So I didn't take so much interest in it. That is the reason I don't recollect all this.

Q. How long a conversation did you have with these two gentlemen? altogether? A. Oh, I don't know. We didn't speak very much. I think they were in the hold—well, I couldn't say how long; maybe five minutes, maybe longer.

Q. Maybe half an hour? A. I don't think so.

Q. Maybe an hour? A. No, I don't think so.

Q. Will you swear it was not more than half an hour? A. No, I would not swear to that, because, as I told you, I didn't take so much interest in it, and I don't recollect those particulars. 1762

Q. Will you swear it was not over an hour? A. I can swear—well, I am nearly positive of that. Because I didn't take the time, you know, and I would not swear to anything when I didn't count the time.

Q. That whole proceeding you had very little interest in? A. Yes. I thought those gentlemen came for wrong information, and that it was not at all to prove something to me, but it was to come for wrong information; and that is the reason I didn't take so much interest. 1763

Q. Out of all the things these gentlemen said to you the only thing you can remember is that they said they found no leak? Is that right? A. Yes; they couldn't find anything to account for the leakage.

Q. And only one of the two said that? A. Yes.

Q. And aside from that remark you cannot remember a single thing that they said at that time? A. I am not at all sure about it, and that is the reason I don't want to say anything that I am not sure about. 1764

Q. But you are sure about that, are you? A. I beg your pardon?

Q. That one said there was no leak? A. Yes. When they were finished, he said, "No, we can't find anything," or, "I can't find anything." That is what he said. I will swear to that.

Q. Where were you when this remark was made

1765 to you that no leak had been discovered? A. I was in the lower hold—No. 3 lower hold.

Q. Were both these two gentlemen present, or only one? A. They were both present.

Q. How many persons were within hearing of that remark? A. I couldn't say. It may have been in one of the officers'; I don't recollect.

1766 Q. Was the second of these two gentlemen present and within hearing at the time that remark was made? A. I don't know. I didn't note that down.

Q. Did these two gentlemen look alike? Were they tall, or short, lean or stout? A. I think they were not stout; they were not short and not stout. They were pretty fairly tall, I think, as far as I remember.

Q. Were they equal in height? A. I don't know. I didn't measure them.

1767 Mr. Kirlin: Did you have their photographs taken?

Witness: No. I am sorry I didn't do so.

Q. You think they were medium, do you? A. Maybe medium, yes. I didn't take any particular notice, because ——

Q. You think they were medium as far as stoutness was concerned, and medium as far as height was concerned? A. Maybe, yes; I don't know

1768 exactly. I didn't take their diagrams or ——

Q. Did either of them wear a beard? A. I don't know. I didn't take much interest in the proceedings at all. That is the reason I didn't take much notice of the gentlemen. I only thought that I did them a favor to show them No. 3 hold, because they wanted to see it for their own interest. That is the reason I can't tell you so much about it.

Q. Were you interested in the remark you say you remember? Did that remark interest you?

A. Well, I don't know, because I didn't know what gentlemen they were; also I didn't see what really their being there had any interest to the ship—that it should be of any interest to the ship.

Q. Do you permit persons indiscriminately to examine your vessel without knowing the errand upon which they come? A. Yes, if there is nothing against them, certainly. Why not? If a gentleman came on board to-day and asked me to see 1770
the ship he could do so. There is no objection. There is no strictness on board of our ship as far as I know.

Q. Did these two persons explain their errand to you when they came aboard? A. Yes, they said to me they wanted to inspect No. 3 lower hold, because there was a claim, I recollect.

Q. Did they say the purpose of the inspection? A. Yes. They said there was a claim of $20,000 on the rice that had been in the lower hold. That 1771
was what they said to me.

Q. And t hey wanted to find out whether it was a good claim or not? A. I think so—they asked to inspect No. 3 hold and asked me to come along.

Q. Now you say you don't remember whether up to that time you had made any investigation into the causes of the injury to the rice? Is that true? A. No, I don't recollect—Well, wait a moment! I believe the mate told me that somebody else had been looking at No. 3 hold, but I am not 1772
sure.

Q. At the time these two gentlemen came to you had you made any critical examination of your vessel and appliances for the purpose of determining the cause of the damage to the rice? A. I am not sure if I did it before or after those gentlemen came. But I have asked the mates if they found any leakage. I know that. I asked it before. Before we were discharged, already, or just when we were discharged, I ask—the mate if he had found any leakage? He said no. So I am not quite sure

1773 whether I made the investigation myself before or after these gentlemen came aboard. I didn't put it down.

Q. You had all the pipes and tubes tested? A. I had them all tested.

Q. And the decks? A. Yes.—I was on deck twice a week sometimes; and I didn't see any leakage.

1774 Q. Did you do everything you could to find out what the cause was? A. Yes. Let water into the pipes.

Q. There was not anything more you could have done at that time? A. No. And I took a candle and I examined as far as I could all the rivets, to see whether they were started or not, to see if there was any show of a leak; and I couldn't find anything.

Q. How soon after the discharge of the cargo 1775 was your investigation completed? A. It was a long time after that. I don't remember.

Q. Do you think your investigation was just as thorough, made at the time it was made, as it would have been if it had been made promptly? A. Yes. There was no cargo in the hold after that.

Q. The ship is in just as good a position as if this suit had been begun immediately upon the discharge of the cargo, isn't it, so far as the conduct of the suit is concerned? A. As far as No. 3 is 1776 concerned, yes—as far as No. 3 hold and No. 3 between deck, yes. Of course, in the meantime there are repairs on the stern of the ship.

Q. Isn't it a fact captain, that at the close of your last voyae the inside of the plating of the ship on the starboard side was very much rusted? A. The holds were more or less rusted all over from the Kainit that got on board of the ship. The cargo of Kainit.

Q. Isn't it a fact that the starboard side was a reat deal rusted? A. The ship was rusty all over in the holds more or less.

1777

Q. Isn't it a fact that the port side was comparatively little rusty? Very little rusty indeed? A. When?

Q. At the close of this voyage? A. At the close of this voyage? The port side was not as rusty as the starboard side.

Q. There was a marked contrast, was there? A. You can see it.

Q. It was a strong contrast? A. It was not a 1778
strong contrast; it is quite a difference between a strong contrast.

Q. Captain, isn't it a fact that at your interview with these two gentlemen you have referred to, one of them called your attention to the rusty condition of the starboard side, and the fact that the port side was comparatively little rusty, and asked how you accounted for such a tremendous contrast? A. No, I don't remember that at all.

Q. You won't swear that did not occur? A. I 1779
will swear that I don't remember it at all. I can't recollect at all that any such question was ever put to me by those two gentlemen.

Q. Upon your arrival in New York at the end of this voyage you began painting the ship as soon as possible didn't you? A. No I don't think we did paint the ship right away. We got all our sailors on the winches.

Q. Doing what with the winches? A. Driving the winches.

1780

Q. For how long? A. The time of discharging.

Q. All the time you were discharging? A. Yes. We gave our own winchmen.

Q. Was there not any painting going on while you were discharging? A. I don't think so. There may have been a little bit, but I should not think so, because they were all busy on the winches.

Q. Isn't it a fact that if a rivet were loose it could be concealed by painting it over? A. No. I don't think so. I don't think so with single paint. If you put some putty in and other stuff in, and

paint it nicely over, you may put the appearance that way; but if you test it you can always feel it, I should say.

Q. You painted the side of the ship opposite No. 3 hold, didn't you, very soon after arrival in New York? A. No, not very soon.

Q. How soon? A. A long time afterwards. Because we scaled the ship first.

1782 Q. Did you scale the ship before you did any painting? A. Yes. We scaled the ship first, and then we put on a coat of red lead, and then we painted her gray. That is only on the outside.

Q. But was there not some painting done before you began scaling? Did you touch up spots? A. We scaled spots first, and scraped them off—scraped off rust first, and scaled it where it was necessary.

Q. Did you do any scaling until after the col-

1783 lision? A. I don't think so.

Q. Didn't you do some painting before the collision? A. I don't think so.

Q. You are not sure of that? A. I am pretty well sure of it, because my men were engaged, and we did not engage any laborers from the shore to do it.

Q. You don't know that all your own men were engaged, do you, at the winches? A. We have only seven sailors and one was paid off and only

1784 six left; and one has to look after the ropes—he is the lamp trimmer; and there are only five men left for six winches.

Q. On your voyage what were your drafts forward and aft on leaving Kobe? A. (Witness looks in log.) Draft forward, 12 feet, 1 inch; draft aft, 17 feet.

Q. Please give me the drafts in the other ports in which your drafts were taken, including your drafts on arrival at New York? A. Leaving Mogi

draft forward, 17 feet 4 inches; aft, 18 feet, 4 inches. Leaving Shanghai, draft forward, 18 feet 3 inches; aft 19 feet. Leaving Foochow, draft forward, 18 feet 5inches; draft aft, 19 feet 10 inches. Leaving Hong Kong, draft forward 19 feet 6 inches; draft aft, 19 feet 7 inches. The drafts leaving Singapore were not taken—too high swell. Leaving Algiers, draft forward, 20 feet 7 inches; draft aft, 22 feet 3 inches. On arrival at New York, forward, 20 feet 4 inches; aft, 20 feet 5 inches.

Q. Captain, when your vessel is on an even keel here is the lowest point in his sheer? A. Just about the middle the bridge deck. That is about opposite the boilers.

Q. Opposite the boilers? A. About, yes.

Q. How far forward of the bulkhead between the engineroom space and No. 3 hold would that be? A. Well, that is the whole engine-room space and part of the stokehole space—part of the boiler-space.

Q. How many feet? A. It may be 30—between 30 and 40 feet.

Q. Now, the more you trim your vessel by the stern the further aft that lowest point of sheer will go, of course? A. Yes.

Q. How far aft, in your opinion, would the lowest point of the sheer be at the time you left Algiers and had the draft of 20 feet 7 inches forward and 22 feet 3 inches aft? A. I think it would be about 5 or 10 feet before the bulkhead —the engine-room bulkhead of No.3; somewhere around there—When I can see the water, when it stands on the deck—when there is any water on the bridge deck—that is the point where the water always remains, as far as I recollect.

Q. Do you remember noticing where the water stood on the deck? A. Yes. I remember it stood

there—it stood up there just opposite the officer's rooms, where it stuck.

Q. How much is the sheer of your vessel in all? A. I don't know.

Q. Can't you tell whether it is 2 feet or 6? A. No, I don't know. I would not guess at that.

Q. The inboard portion of the stringer plates carries a groove which will hold water from one
1790 end of the hold to the other, will it not? A. Yes —no—on the ends it will run out. The angle iron runs over, as far as it is connected there with the plate, you see, and then the water can run out there at the ends.

Q. That is, the end of the hold? A. The end of the hold near the bulkhead where the water can run out.

Q. Each bulkhead? A. Yes; where it is fastened on to the frame plate—connected on to the
1791 bulkhead.

Q. Now, there are two places for water to flow out of that gulley, one at the forward bulkhead, and one at the after bulkhead? Is that right? A. Yes.

Q. That groove was substantially full of dunnage on this voyage, was it not? A. Not substantially full.

Q. It was well filled with dunnage? A. I was not there all the time. I only saw some of the
1792 stove wood lying in it and shifting boards on top; but there was some room between those pieces of stove wood.

Q. That groove with the dunnage in it that it had upon this voyage would carry water, but it would flow with some difficulty on account of the dunnage? Isn't that true? A. Yes.

Q. Now, the flange or projection forming one side of this groove or gulley is situated next to the cargo battens, isn't it? A. Yes.

Q. Does the casing around the drain pipe touch that flange? A. I couldn't say. I didn't take sufficient notice of that. It may be, though.

Q. Does not that casing occupy the entire space between the skin of the ship and the flange on one side of that gulley? A. And the cargo battens. Yes, that is so.

Q. Isn't there a place of the cargo battens cut away in order to enable the casing of this pipe to come up flush against the flange I have referred to? A. No. I think it is filled up between. 1794

Q. You think the cargo battens are between the casing and the flange I have referred to? A. Yes. I think it is filled up between. I don't think the cargo battens are broken off.

Q. In that case the casing referred to would be about an inch distant from the flange? Is that right? A. I don't understand the question.

Question repeated. A. Yes.

Q. If water should be flowing down inside that casing, and were obstructed at a certain point from flowing further, it would very probably come out through the cracks or joints in the casing and flow into the groove on this stringer plate, wouldn't it? A. It all depends on what it would run out of. If it would run out between the skin and casing, then it would run straight down into the bottom of the ship. If it would run out on the outside of the casing, then some of it may run into the groove—in the stringer. 1795 1796

Q. It would depend upon which place in the casing the water came out of? A. Yes.

Q. But if it came out of the face of the casing in the centre of the hold, then it would flow into that groove or gulley? A. Then some would run into the stringer, yes.

Q. How often do you generally wash the between-decks in No. 3? A. Only when it is necessary. There is no special time for it.

Q. How many times have you washed the between-decks since you have commanded the ship?

A. We washed the between-decks after we dischargd the cargo of coal.

Q. What port? A. Alexandria. And we washed the between-decks after we discharged the cargo of manganese ore in Baltimore; and we washed the between-decks after we discharged the cargo of kainit at Charleston.

Q. Is that all? A. That is all, I think. That
1798 is all I recollect.

Q. You have never washed the between-decks at a time when there has been perishable cargo beneath, as far as you know? A. Excuse me. There is another one of them. We washed the between-decks after we discharged the horses from Australia. We had horses in the between-deck, and it was wet there all the time during the voyage—and no leakage was found there.

Q. No part of the ship or appliances was car-
1799 ried away by the storms that you encountered on your last voyage? A. No.

Q. Have accidents occurred on other voyages in addition to the ventilator which you have already mentioned? A. Yes.

Q. How frequently? A. It was only on the voyage from Poti to Baltimore, in the North Atlantic, that I remember that we had some damage by heavy seas breaking over the vessel.

Q. That is the only time you remember? A.
1800 Yes, outside of that ventilator.

Q. Didn't you have less stormy weather on this last voyage than you would usually encounter on a voyage of that duration? A. No.

Q. About the same? A. Yes. You can expect a voyage like that.

Q. About the same? A. Ordinary voyage.

Q. It is an ordinary voyage? A. Yes.

Q. You call it an ordinary voyage as far as storms are concerned? A. Yes. You may have more, you may have less. You may have more

storms and less storms. You may have more stormy weather and less stormy weather.

Q. When you loaded the rice it was in perfect condition, as far as you know, was it not? A. As far as I know, yes.

Q. You suggested on your direct examination that it may have been on board lighters the day before you started loading. While on the lighters, do you know whether it was covered or not by tarpaulins or any other covers? A. I don't know. I don't remember that.

Q. Was the weather in Kobe cold up to the time of your finishing the loading of the rice? A. Yes.

Q. How cold? A. I didn't take the temperature, but it was pretty cold.

Q. Was it below freezing? A. It was not quite freezing, but there was some snow falling the day before.

Q. Did the snow lie on the ground? A. Yes.

Q. Did it melt before you finished loading the rice? A. It may be; I don't know.

Q. You don't remember? A. No.

Q. You testified on your direct examination that there would be some sheer of the stringer plates in hold No. 3. Which way would the sheer be? On your last voyage? A. Forward; the stringer plate would be higher up aft in the hold than forward in the hold.

Q. You don't know whether that would be as much as an inch, do you? A. I couldn't give you the measurement.

Q. Do you say that you caused the casing of the scupper pipe to be taken off independently and irrespective of any request made upon you by the two gentlemen with whom you had the interview? A. I don't recollect that they asked me if they could take the casing off.

Q. Did you of your own accord have any casing

taken off? A. I didn't order the casing taken off.

Q. No casing at all? A. I didn't order the casing to be taken off.

Q. When you said you had certain tubes and pipes tested, what pipes and tubes were they? A. They were all the pipes and tubes in the fore part of No. 3 hold.

1806 Q. On the starboard side? A. On the port side too.

Q. Both sides? A. Yes.

Q. What tests were made of these pipes and tubes? A. Run water through it.

Q. You did not plug up the lower end of them? A. No.

Q. Did you run the water out from a bucket? A. Yes.

Q. Have you had any experience with cargo damage due to sweat on any ship that you have
1807 been in? A. Yes, I have.

Q. How does sweat manifest itself when it damages cargo, so far as your experience goes? A. The sweat I am speaking about was bags of flour. They were only damaged on the outside.

Q. Did you ever know a case of sweat-damage in your experience to be so serious as the damage to the rice in this case? A. Oh, yes, I know of cases of sweat, where about 900 tons of the cargo was spoilt.

1808 Q. Tell what case you know of where the damage was so serious as the present damage in your experience? A. It is about 5 years ago, I think. There was a lot of grain came over all in a damaged state into Rotterdam.

Q. On what ship? A. On several ships.

Q. That is bulk grain? A. Yes.

Q. Do you know of any bag goods being damaged by sweat? A. No. But I have been reading

1809

a case about rice where they say that rice is easily damaged in bags and in bulk.

MR. BROWN: I move to strike out what they say.

Q. During the discharge of this rice how much of the time were you in the hold yourself? A. I only looked once at it.

1810

Q. There was only one occasion upon which you went below into the hold during the time the rice was discharged? A. Yes.

Q. How much of the rice had been discharged at that time when you went below? A. I don't know exactly.

Q. About how much? Was the hold half discharged? A. Yes, it was more than half discharged. It was after the bulk of the damage was out already.

1811

Q. The bulk of the damage— A. Was out already.

Q. What day was that? A. I don't know.

Q. How many days were you discharging the rice? A. I don't know exactly; I think about four days.

Q. Had the rice been entirely discharged at the time of your interview with the two gentlemen you have referred to? A. Yes. The ship was lying in Erie Basin Dry Dock then.

1812

Q. How long after the rice had been completely discharged was that? A. I don't know.

Q. Give your best judgment. Was it a matter of weeks or days? A. I don't know. I didn't put it down. But, as I said before, I didn't take enough interest in it.

Q. You knew as soon as the cargo was discharged that it was a very serious case of damage, didn't you? A. I knew there was damage, but ——

1813 Q. You knew the damage was serious? A. Not so very serious. I only thought about 200 or 300 bags or so, or 400 bags—200 or 300 bags.

Q. At the time when you went down to make that examination hadn't it been reported to you by the stevedores that a thousand bags of rice were damaged? A. The stevedore? No; I don't think he reported anything.

1814 Q. Hadn't anybody reported to you that a thousand bags were damaged? A. No. I asked the chief officer how many bags there would be damaged. He said about two or three hundred.

Q. That is all the information you had? A. Yes.

Q. From your examination of the hold do you know where the damaged cargo came from? A. Yes.

Q. Where? A. It came from the wing, about
1815 the middle of the hatch, a little bit further than the fore end of the middle of the hatch.

Q. Do you know how near up to the between-decks the damage extended? A. No. Because I was not down at the time.

Q. You mean the cargo had not been taken out of the wings yet? A. All the cargo was taken out when I was down—when I came down—not all the cargo; some of the damaged rice was taken out when I came down. Therefore I didn't know how
1816 far it extended to the between-deck.

Q. From your observation you could not tell how much of the damaged cargo came from the starboard side and how much from the port side, could you? A. No.

Q. Could you tell from your examination how near to the bottom of the ship the damage extended? A. No. But I was not down all the time, and I didn't know when they came to the sound bags again.

Q. You have testified that there was no water

in the between-decks on this voyage? A. Yes.

Q. What knowledge have you from your own observation upon that subject, if any? A. I know that no water—if there was any water in the between decks it would run down in the bilges, because there is the drain pipe. No water was pumped out during the voyage from the report I got from the chief officer from the soundings, and when the cargo was in course of discharge in New York I could see from the deck that the between-deck was dry.

Q. Your knowledge on the subject is that the carpenter reported to the chief officer, and the chief officer to you, that there was very little water in the bilges? A. Yes.

Q. And the engineers reported to you that they were not pumping bilges? A. Yes.

Q. And therefore you infer that there was no water in the between-decks? A. Yes.

Q. And that is all you know about it? A. I saw. I could see from the deck that the between-deck was dry in the course of discharging the cargo out of the between-deck.

Q. At what time did you look into the between-decks and see that it was dry? A. I don't know. I have been down there very often. I walk often on that deck.

Q. The between-deck was full of cargo, was it not, on the voyage? A. On the voyage, yes.

Q. You could not tell whether there was any water in the between-deck or not without removing the cargo, could you, on the voyage? A. That is so. But if there had been water it would have run down and you would have found it in the bilges.

Q. Now, the only knowledge you have as to whether there was any water in the between-decks on the voyage or not is your inference, based upon the reports made as to the soundings and as to

1821 the omission to pump the bilges, and your observation at the end of the voyage after the cargo had been taken out of the between-decks? Isn't that true?

MR. KIRLIN: That is not what he said.

MR. BROWN: I ask him if that is true.

1822 A. All that I know about water in the between-deck is that during the voyage no water was coming out of the bilges, which bilges were connected with the pipe in the between-decks. If there had been any water in the between-decks it would have run down through this pipe into the bilges, and we would have found some water in the bilges. And when we discharged the cargo in New York I saw that the between-deck was perfectly dry; so was the dunnage in the between-deck.

1823 Q. Now, you don't even know of your own knowledge that the bilges were not pumped out, or that there was not much water in the bilges, do you? A. There was no water in them when they opened them.

Q. Answer the question. I asked you of your own knowledge? A. I know from the report of the chief officer that there was no water in them.

Q. Not directly of your own knowledge? A. I didn't go down in the bilges, because I don't go

1824 down.

Q. You did not sound the bilges yourself? A. I didn't do it, because it was the chief officer's and the engineer's work.

Q. I only want to know what your own knowledge is. I am not criticising you at all for not doing it. A. Yes.

Q. Now, do you mean to have us infer that, in your sober judgment, you think that a condensation of sweat could get into the casing around the scupper pipe and make the stuff inside of the scupper pipe as damp as you found it to be in

New York? A. Yes. The temperature in the hold would have been about the same as in the casing. The condensation just must free itself. Outside of the hold is as cold as inside. There the condensation commences. Also, there could have been the same condensation on the side of the ship inside of the casing as outside of the casing.

Q. Have you had any conversation with your first officer and second officer relative to the cha- 1126
racter of their testimony here? A. No.

Q. Haven't you suggested to them that they ought to describe the condition of the bags, of the dunnage and of the stuff inside the casing as dampy? A. No, I didn't do that.

Q. Are you familiar with the word "moist"? A. Yes.

Q. You use that word sometimes, do you? A. Yes.

Q. Have you any explanation to offer why it is 1827
that yourself and your officers can find no other word to describe the conditions referred to than the word "dampy"? A. Yes; because it was dampy and nothing else.

Q. You have had a written statement of your expected testimony taken here in this office, haven't you? A. No.

Q. Prior to your examination to-day have you not been here to the office of Convers & Kirlin and made a statement to them? A. No. 1828

Q. Haven't Convers & Kirlin, or some representative from their firm, ever taken any statement from you prior to your examination here? A. I have given a translation as far as I could from the log.

Q. But you never gave them any other statement as to the controversies in this case? A. I don't know. I don't recollect. I know I have been in here.

Q. You cannot remember whether you came

1829 here and had a statement dictated by Mr. Kirlin or one of his assistants to a stenographer? Will you swear whether that occurred or did not? A. I can swear there was no statement dictated to me.

Q. Didn't you make a statement to Mr. Kirlin, or to one of his assistants, and was not the substance of that statement dictated to a stenogra-
1830 pher, either by yourself, or Mr. Kirlin, or his assistant? A. No. I only recollect that I have been here one day to translate.

Q. You can't remember ever having made any other statement to Mr. Kirlin or his representative excepting to translate the log? Is that right? A. Wait a moment. Yes, thinking it over, I have been here several times now. Yes, I have.

Q. You have given them a statement? A. Yes, as I now recollect, the first time I came here I
1831 was called over from Mr. Winchester, and Mr. Kirlin asked me about what I knew about the damage to the rice.

Q. Was there a statement dictated to a stenograher at the time? A. I don't know. I couldn't recollect. It may be.

Q. You don't know whether it was or was not? A. No, I couldn't say that.

Q. Was not your statement afterwards read over by you or to you? A. No, I have not read
1832 it over at all; I have never seen it afterwards.

Q. Do you remember whether the word "dampy," or "damp" was in that statement? A. I don't recollect that at all. It must have been about a fortnight ago. It must have been damp or so.

Q. (Bill of lading shown witness.) Is this the copy of the bill of lading under which that rice was carried? A. I think it is a copy, but I couldn't swear to it, because I didn't sign it myself.

Q. You have your own copy of the bill of lading, haven't you? A. Yes, but I don't have it now.

Q. Is this a duplicate of it as near as you know? A. It looks like it.

Q. To the best of your knowledge and belief is that a copy of the bill of lading? A. To the best of my belief, yes.

MR. BROWN: I offer this in evidence.

MR. KIRLIN: I object to it as insufficiently proved.

Marked Libellants' Exhibit B, Aug. 1, 1901.

Witness: I couldn't tell to a certainty, because I have not got the copy, but it looks like it.—This is not a copy. (witness looking at said bill of lading.)

Q. You say that this is not a copy? A. No, it is not put down as a copy. You can see. If the bill of lading was a copy it would be put down as "copy."

Q. Is this the original bill of lading or a copy of it, as near as you know? A. I couldin't say, because I didn't sign the bill of lading, and I can't compare them. It looks to me like it, but I am not positive, because I can't say positively. I can't compare it.

RE DIRECT-

MR. KIRLIN: Before the conclusion of the Captain's examination I will ask the counsel for the libellants to state the way in which he condends, or intends to contend, that 877 bags of rice were wet with sea water, as alleged in the Fifth Article of the Libel.

MR. BROWN: Counsel for libellants expects the ship to account for the wetting

of the bags. They were delivered to the ship in good condition, and redelivered to the owner of the cargo in bad condition. Counsel for libellants suggests, as a probable explanation, that the water found entrance into the between decks, and flowed down at a very slow rate outside of the scupper pipe through the opening in the between decks permitting the scupper pipe to pass through, and thence on the exterior surface of the scupper pipe until a point was reached somewhere near the upper stringer plate, or between it and the second stringer plate, and then, meeting a solid mass of dirt, dust and grain, was forced out through the cracks of the casing of the scupper pipe, found lodgment in the gulley of the stringer plate, flowed along the stringer plate to the lowest part of it, overflowed the gulley, and entered the rice. Another explanation would be that there may have been a faulty rivet in the side of the ship, through which the water three or four feet under the between decks. Counsel for libellants does not feel called found entrance in the vicinity of the between decks—or a few feet under the between deck or three or four feet under the between decks. Counsel for libellants does not feel called upon to account for the cause of the damage, bue is very willing to give his conjectures since they have been requested.

MR. KIRLIN: I do not ask for any conjectures or suggestions. But, as the expert for the libellants who examined the ship is now present, and I assume knows as much about the source of the damage

as he ever will know, and as the captain is also present, and as the Libel does not state how the water was supposed to have got in, or allege any defect in the vessel, I think it fair that counsel should state what he expects to prove on those points; and for that reason I make the request which I deem counsel is not bound to comply with if he does not want to. 1842

MR. BROWN: Counsel for libellants states that he believes he has ample evidence in his possession to disprove the theory of sweat.

Q. Captain, you have heard the two suggestions which counsel has made as to how water might have got in and damaged the cargo. Was there any way, so far as you know, by which any water could have got in the between decks 1843
of No. 3 on this voyage? A. No.

Q. Was there any water in there to your knowledge? A. No.

MR. BROWN: You mean you don't know of there having been any water in it?—Question objected to as ambiguous.

Q. Have you examined the upper deck and the between deck of the vessel since you have been in port with a view to discover whether there 1844
was any leak in either one of them? A. Yes. We could not find a leak.

Q. Were you there when Mr. Cougdon examined the decks? A. Yes.

Q. Did you examine them with him? A. Yes.

Q. Now, Captain, when you put water down the drain pipe, did any of it run outside of the drain pipe? A. No, nothing.

Q. How was the water put down? A. There

is a grating on top of the pipe. We just took a bucket of water, and poured water on top of the grating, and it ran down on top of the pipe.

Q. Was it poured on in such a way that any portion would have run outside of the pipe if there had been a leak where the pipe joins the deck? A. Yes.

Q. And you say none went out? A. Yes.

1846 Q. Did Captain Salter, when he was there, or did either of these other two men who were there, suggest to you at the time that there was any leak in that pipe?

Objected to.

A. There were two gentlemen down. I don't recollect if it was Captain Salter; but he—

1847 MR. BROWN: Objected to upon the ground that the Captain testifies that he doesn't know in fact that Captain Salter was present.

Question repeated.

Same objection.

A. No.—I say I don't know if Captain Salter was there; but the two gentlemen who were down there, when we put water to the pipe, said they couldn't find a leak. That is what they said.

1848 MR. BROWN: I move to strike out this conversation, on the ground that it is not shown to have been made by any person entitled to bind the libellants by way of admission, and is not part of the *res gestæ*.

Q. Did these men who came on board introduce themselves to you by name—these surveyors? A. No.

Q. Did they tell you whom they appeared for—

who sent them there? A. They told me they thought there was a big damage of about $20,000 —a big claim on the rice of $20,000—and they were going to look into No. 3, and asked me if I would come along; and I went along with them.

Q. Did they tell you whether they appeared on board the ship in the interests of the ship, or in the interests of the cargo, or in the interests of the insurers of cargo? A. No, they didn't tell me.

Q. Now, you heard the suggestion about a defective rivet about three feet below the main deck. Did you examine the ship's side? A. I did.

Q. Were you there when Mr. Congdon examined the ship's side? A. Yes.

Q. Did you examine the part which counsel has indicated as possibly having had a defective rivet in it? A. I went along the whole side of the ship there with a candle and looked at every rivet as good as I could.

Q. And can you state from the examination you made whether there was any defective rivet along there? A. Yes. I can state that there was no defective rivet.

Q. Did any of these surveyors who were there on board the vessel suggest to you, or intimate in any way, that there was any leak in the side of the ship? A. No.

Q. Or defective rivet? A. No. They said the ship was in perfect condition.

MR. BROWN: I object to all this about the statements of the surveyors.

Q. During the time that you had the hatches, or the hatch, off for ventilation during the voyage how many of the covers were removed?—The hatch has a number of covers, I assume? A. A number of covers, yes.

Q. How many? A. We took them all off, as far

1853 as we took the hatches off. You mean tarpaulins or covers.

Q. I don't mean that? I mean the wooden sectional covers. How many of those did you take off for ventilation? A. We took four off, two forward and two aft. And the top of the vertical ventilators would let the air come up.

1854 Q. Is that the usual way in which you ventilate cargo? A. Yes.

Q. Were the other holds ventilated in the same way? A. No.

Q. This ventilation was done for the rice, was it? A. Especially for the rice.

Q. Had you any instructions about that? A. I had no instructions, but I knew that rice cargo is very liable to heating, and that is the reason I took special precautions.

1855 Q. Has the inside of the ship been painted at all since you have been in port? A. No.

Q. Are the sides just as they were? A. Exactly.

Q. Are the under sides of the deck as they were? A. Yes.

Q. Have they been painted at all? A. No.

RE-CROSS.

1856 Q. Now, you say that in testing the scupper pipe you poured water into the between decks at the place where the grating leads into the pipe? A. Yes.

Q. At that time was the casing on or off? A. At that time the casing was off.

Q. The casing was only off one scupper pipe, was it not? A. The other pipe is not covered in. It is just behind the reversed angle—the other pipe: it is not cased in.

Q. Do you mean that the scupper pipe in No. 3 hold on the port side is not cased in? A. Oh, yes, there too.

Q. Now, did you pour water into the port scupper pipe? A. Yes.

Q. At the time when you poured it in was the casing on or off? A. No, the casing was on; but we looked underneath to see if any water would come.

Q. You looked where? A. Underneath where the scupper pipe goes through it. I looked to see if there was any water coming around there.

Q. And on the starboard side where did you say you looked to see if any water was coming out? A. I just looked underneath it, and on top too.

Q. When you looked to see where did you stand? A. I went all up to the deck as far as I could up the stringers—on top of the first stringer—and went all around all down.

Q. Do you know whether any kind of stuffing, oakum, or anything of that sort, had been placed in around the pipe where the grating was at the time when you made that test? A. Where the grating was?

Q. Yes. A. No.

Q. You don't know whether that had been done or not? A. I know there was none there.

Q. You know you did not do it? A. I know I did not do it.

Q. That is all you know, isn't it? A. Yes.

Mr. Kirlin: I think these suggestions that counsel makes as to attempts at concealment, plugging up of holes, cooking up testimony, are highly improper, and utterly unwarranted, and I desire to leave on the notes my protest against his conduct.

Q. When you examined the exterior of the scupper pipe below the between decks on pouring water into the between decks how did you do it?

A. I just looked through it around with a candle.

Q. You had a candle? A. Yes.

Q. Did you fill that scupper pipe? Could you reach it? A. I could see it. Certainly, it was just near. It goes right down the side of the ship.

Q. Did you feel it? A. I could see it. I didn't need to feel.

1862 Q. You didn't feel it with your fingers? A. If I had seen any water come down I would have felt it, but I saw no water coming anywhere.

Q. Which stringer did you stand on when you examined the under side of the between decks? A. I stood on the upper stringer.

Q. Was the casing entirely off the scupper pipe at that time? A. Yes. That means the outside—the side boards; they stand there all the time. But that is no objection, for you can see the pipe as soon as you have taken the outside lining off.

1863 Q. You had only taken off one side of the casing—the board toward the hold? A. Yes, the board toward the hold. We didn't take the side boards off there, because there was no need.

Q. What day was it that you made this test with the scupper pipes? A. I don't know exactly. Sometime when we were lying down in Erie Basin.

Q. Was that after your collision damages had been repaired? A. No, I think they were not all finished yet.

1864 Q. Who assisted you in making that test? A. The officers.

Q. The ship's officers? A. Yes.

Q. Any person from the shore assist you? A. No, I don't know.

Q. How much water did you put in the between decks in making this test? A. Several buckets.

Q. Two or three buckets? A. Yes.

Q. Did you try it on one occasion or more than one occasion? A. There was some water run through the pipe when those two gentlemen who asked me to examine No. 3 hold were there; and

afterwards I have done it all over with the officers to see if I could find anything.

Q. Did you see those two gentlemen making a test? A. Yes. They were in the hold when they put water down through the pipe. He tried to block the pipe up at the time, I think, but—

Q. Did those two gentlemen test the starboard and port pipes, or only the starboard pipe? A. I believe, as far as I recollect, they only tested the starboard pipe.

Q. Did you assist in that test by these two gentlemen? A. I didn't assist in it at all, because I thought they came for a wrong purpose.

Q. You thought they came for a wrong purpose? A. Yes—for wrong information.

Q. Did you watch the results of the test to see whether they found the leak or not? A. I didn't look at it very carefully. I didn't take much interest in it.

Q. How long after that was it that you made your test? A. I couldn't tell exactly.

Q. Was it several weeks? A. No, I don't think so. It might have been before, but I don't know exactly.

Q. You don't know which test came first? A. No.

Q. Whether you tested first or whether they tested first? A. I believe I did afterwards, but I am not quite sure, because I didn't take much notice of the test by those gentlemen.

RE-RE-DIRECT.

Q. Have any repairs been made to those scupper pipes since the vessel has been in port? A. No.

Q. Are they in the same condition to-day that they have been right along and were during the voyage? A. Exactly.

1869 Willem Van Eyken.

New York, August 7, 1901.
11.30 o'clock P. M.

Present—Mr. Kilbreth; Mr. Brown.

Willem Van Eyken, recalled and examined by Mr. Kilbreth, testifies as follows:

1870 Q. Captain, since you testified before on July 31st and August 1st have any repairs or changes been made in the structure of No. 3 hold, or of any of the holds, or of any pipes leading to it or in it, and particularly of the scupper pipes leading from the between-deck bilges? A. No. No repairs have been made.

Q. Do you recall that a test was made of the scupper pipes some days ago? A. Yes.

Q. What was the nature of that test?

1871 Mr. Brown: Was that before or after his former examination?

Mr. Kilbreth: After.

A. We filled up the scupper pipes; we plugged up the scupper pipes, and filled them up with water, so that there was about half an inch or more on top of the scupper pipe in the between-deck—the water; and then we looked at the pipes and looked at it, and felt if there was any water came
1872 through; and we could see nothing; we could detect nothing at all—no leakage whatever.

Q. What day was that? A. That was about a week ago, when the surveyor was aboard.

Q. It was the 3rd of August, was it not? A. I think so. We have got it in the log book.

Q. Who was present at that test? A. Mr. Congdon, Lloyd's surveyor, was there, and the chief officer was there (Mr. De Boer), and the third officer was there too.

Q. You say the ends of the pipes were plugged? A. Plugged.

Q. How was that done? A. We made wooden plugs, and put some waste around it, and hammered those into the pipe underneath.

Q. And then you filled up the pipe from the between decks? A. Filled up from the between-decks; run the water right in from the between-decks just as long as the water would run over and come in the between-decks.

Q. And did you examine the pipes personally? 1874
A. Yes.

Q. Did you feel of them? A. Yes.

Q. Both on the starboard and port side this test was made? A. Yes. Both sides. Yes.

Q. And you say you discovered no leak? A. No leak whatever.

Q. Nothing had been done to those pipes in the way of repairs, or anything of that sort, between the time of your testimony and the time of this test? A. No. 1875

CROSS-EXAMINATION by Mr. Brown:

Q. I understand you to testify that from the time this injury was discovered when the cargo was being discharged up to the present time there have been no repairs made to either of the scupper pipes, or the gratings above them, or the fittings of the gratings or pipes in the between-decks? A. No.

Q. So far as you know? A. No. No repairs 1876
have been made.

Q. And you have given no orders or directions for such repairs to be made by anybody else? A. No.

Q. That is all you personally know about it, is it not? A. Yes, I know that no repairs have been made.

Q. You don't mean that you have been there on the ship all the time, and must necessarily have known if anything had been done to the scupper pipes or gratings? A. I mean to say that if there

had been any repairs made I would have known.

Q. You meean to say you would necessarily have known it? A. If any repairs have to be made on board of the ship I have to give instructions.

Q. You mean you would have known it unless some one would have violated his duty, because it would be his duty not to make repairs without your instructions? Isn't that what you mean? A. Nobody has any right to repair anything to the ship without letting me know.

Q. That is what you mean when you say you know it has not been done? A. Yes, that is what I mean when I say I know it has not been done.

Q. After you had finished pouring water into the scupper pipes on this last test how high up did the water stand? A. The water came above the pipe in the between-deck. From a half to an inch of water was in the between-deck on top of the pipe—on top of the grating—on top of the grating of the scupper pipe.

Q. Was your ship on an even keel at the time? A. About; not exactly; about an even keel. I don't know exactly the draft.

Q. The between decks has a curve, I suppose? A. Yes.

Q. So the grating is the lowest part of the curve in the wing of the ship? A. In the fore part of the between deck. It is usually the lowest part.

Q. How far inboard did the surface of the water extend as you were making that test? A. I didn't measure it.

Q. About how far? A. A couple of feet; two or three feet, I think.

Q. That is true of both sides of the ship? A. Yes.

Q. What time of day did you make this test? A. I don't remember exactly the date, but it is in the log.

Q. I ask you the time of day—the hour of the day? A. It was in the morning, about 10 o'clock; between 10 and 11 or so.

Q. You first plugged both pipes at the bottom? Is that right? A. Yes.

Q. And then you filled up both pipes on the two sides? A. Yes.

Q. How long was it before you took the plugs out? A. We waited and left the plugs in until the surveyor was over.

Q. When you plugged the pipes and filled them up Mr. Congdon was not there? A. Yes, he was there when we filled the pipes up.

Q. You say you waited until he came over before taking the plugs out. What do you mean by that? Did he go away and return again, or what? A. We waited to take the plugs out until the survey was over. After the survey was over we took them out.

Q. Until Mr. Congdon's survey was finished? A. Yes. As soon as it was finished we took them out.

Q. How long did that take? A. I don't know. I was not there when they took them out.

Q. Were the casings on the scupper pipes in the hold in position at the time? A. No. The casings were taken off.

Q. You mean the front plank of the casing on both sides? A. The front plank; and we took the side planks away, too, to look right around the pipe.

Q. Did you take away all the casing from the between decks from the floor down to the floor or ceiling of the hold? A. Yes.

Q. So there was not a plank of the casing left on there? A. No; there was only a few planks left of the side casing between the cargo battens; but they were pushed aside to have a free look on the pipe.

1885

Willem Van Eyken.

Q. Did you tie anything around the pipes in the hold on the outside? A. Tie anything around? No.

Q. You did not tie a cloth around—which would become wet if any water had dripped down? A. We did not tie anything around the pipe, no.

Q. Did you put a bucket under the pipe while you were making this test? A. No.

1886

Q. You depended entirely upon looking at the outside of the pipe with the eye in the hold in order to find out whether any water could get through or not? A. Is that right? A. We looked at it, and felt of the pipe, too; and the pipe was perfectly dry all around.

Q. Who felt of the pipe? A. The surveyor did, and I did myself too.

Q. Mr. Congdon? A. Yes.

Q. It was done in exactly the same way on both

1887

sides of the ship? A. Yes.

Q.Did Mr. Kirlin tell you that you ought to have this test made?

Objected to.

A. The surveyor came on board and told me that he wanted to make a survey.

Q. Did Mr. Kirlin, on the day of your former examination in this case, tell you that you ought

1888

to have that test made by plugging up the pipes?

Objected to.

A. I don't remember that.

Q. You don't remember whether the idea of making this new test was your own or Mr. Kirlin's idea? A. It was not my own idea; for I knew it was tight, and did it before myself.

Q. You thought it was nonsense to make any further test, did you? A. Personally, yes, because I knew it was tight.

Q. You thought it was nonsense to make any test when Captain Salter and his companion came on board the ship? A. Yes. I thought, too, that it was not necessary, because I knew there was no leakage.

Q. Now, when Captain Salter was on board the ship you would not even assist in making the test, would you? A. I did go down in the hold and I told them anything they wanted we would do. One of the officers was there, and one of the sailors, too, I believe; and what they wanted done we did, I think. For they didn't complain of it; when they went away they thanked me for the assistance rendered.

Q. But you would not take part in making the test yourself at that time, would you? A. I had nothing to do with it.

Q. When they requested you to observe the conditions you would not observe them? A. They did not request me to observe the conditions.

Q. When were you persuaded to have this last test made?

Objected to.

A. Mr. Congdon came on board, and he told me he had to make a test, and asked me if I would give him all facilities necessary. I said yes.

MR. KILBRETH: If counsel wishes to know how this test came to be made, I am perfectly free to say that Mr. Congdon was sent for to the ship by us to make this test and to survey the vessel.

Q. You did not give any notice of the intention to make this test to the cargo owners or the libelants in this case, did you? A. I did not.

Q. None was given as far as you know? A. I don't know. I didn't give any notice. That is all I know.

Q. Do you know of any reason for not giving the cargo representatives an opportunity of being present?

MR. KILBRETH: Objected to. The cargo interests were formally invited to survey the ship on the previous examination of the captain.

1894 MR. BROWN: They were not invited to attend this test. You didn't give them the opportunity.

MR. KILBRETH: We gave them every opportunity to examine the ship that possibly could be desired.

MR. BROWN: They were given an opportunity with certain limitations as to time which could not be complied with. No one could be found to go on such notice.

1895 Q. Do you know of any reason why no notice was given to the representatives of the cargo to attend upon this test?

Objected to.

A. I didn't ask for the test, and so didn't give any notice.

Q. You know of no reason why that opportunity was not given, do you? A. Only Mr. Cong-
1896 don came on board and asked me if I would assist him.

Q. Try and answer my questions. The question is whether you know any reason why the opportunity was not given? A. I didn't ask for the test. So I can give no reason.

Q. If you don't know of any reason please say you don't. A. I didn't ask for the test; so I don't have any reason.

Q. That is not the question that was asked you. A. I think it is.

Q. All right, captain.—Isn't it possible that the water that damaged this cargo may have come from the engine room? A. No. Impossible.

Q. That is entirely impossible? A. Entirely impossible.

Q. If the engineers were negligent in managing their pumping, couldn't the cargo have been damaged by that negligence? A. No; not the way this cargo was damaged.

Q. Couldn't it have been damaged by negligence in failing to put on the hatches, or keeping the hatches on? A. No.

Q. Are you positive that there was no such negligence on the voyage? A. Yes.

Q. Are you positive that the water could not have come in during a storm from the carrying away of some device or apparatus on the ship? A. No, we didn't find any damage. We didn't find any damage to the ship.

Q. That could not possibly be the right explanation? A. No.

Q. Now, captain, if methods could be found of showing beyond question that the damage was not sweat damage, is there any other explanation that you could offer for that damage? A. No.

1901 Thomas Congdon.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GUSTAV JAHN *et al*,
Libelants.

1902 AGAINST

THE STEAMSHIP "FOLMINA,"
Claimant.

Deposition of THOMAS H. CONGDON, taken on behalf of the Claimant, before Edward H. Carpenter, Notary Public, at the office of Messrs. Convers & Kirlin, No. 5 Beekman Street, New York, May
1903 9, 1902.

NEW YORK, May 9, 1902.
3 o'clock P. M.

Present—Messrs. CONVERS & KIRLIN (by MR. KIRLIN, for Claimant.
Messrs. BUTLER, NOTMAN, JOLINE & MYNDERSE (by MR. THACHER) for Libelants.

(Testimony taken pursuant to stipulation same
1904 as on page 1 of minutes of claimant's depositions.)

THOMAS CONGDON, called on behalf of claimant, being duly sworn, testifies as follows:

DIRECT EXAMINATION by Mr. Kirlin:

Q. Mr. Congdon, you are principal surveyor for Lloyd's here, and have been for many years? A. For 20 years.

Q. Did you visit the steamship *Folmina*, at our request, and make an examination of the No. 3

hold and its appurtenances, with a view of seeing whether there had been any leakage into that hold? A. I did.

Q. On what dates did you visit the vessel and make such examination? A. (Witness looks at book.) On the 26th of July, 1901, was my first visit for this purpose.

Q. And what was the date of the second visit? A. The 2nd of August. 1906

Q. Prior to those dates had the vessel been under your supervision for repairs in any other parts of her? A. She had been, yes.

Q. For what length of time? A. For several weeks.

Q. For what kind of damage had she been repaired? A. She had more or less damage to her stern frame—broken rudder &c, which necessitated her going to dry dock; and after the rudder of the stern frame was taken away she was un- 1907 docked and lay alongside of the wharf at Erie Basin, and remained there until the newer frame was ready for her; and then she was put into dock and her repairs completed. So I saw her many times.

Q. During the course of those repairs were you aboard the vessel frequently? A. Yes.

Q. Was there any repair made in the No. 3 hold, or in that region anywhere? A. No. There were no repairs made there. 1908

Q. Now, on the occasion of your first visit, please state what examination you made, and what you found in No. 3 hold. A. I made a careful examination about the hold—stringers in the side of the vessel, rivets, the decks; and generally as close an examination as could have been made while the ship lay there.

Q. In what part of her? A. The No. 3 hold.

Q. State what you found the condition to be? A. The underside of the deck and beams of No.

3 hold were rusty, and (my notes have it) caused, it was considered, by condensation of heated air from cargo.

MR. THACHER: Objected to as hearsay.

Q. Was that your opinion about it? A. Yes. That is the opinion that I noted here.

1910 Q. The opinion that you formed at that time? A. The opinion I formed and noted at the time. There were no indications on the vessel's sides of leakage, either at the seams, butts, or rivets. Then my notes have it that the forward end of the underside of the main deck, excepting at the beam stringer, was fairly free from oxidation. Then my notes go on:—ventilator at each end of the hold. Then at the fore end of No. 3 there were two scupper pipes, one from the between decks, and one from the upper bunker. Then on the 2nd

1911 of August, which was the second visit, I have: Filled and tested scupper pipes, and found same quite tight. Those are the notes in my book.

Q. Mr. Congdon, will you describe the frame work and the construction and arrangement of this stringer plate that ran along longitudinally in the lower hold? A. Below the main deck there are three stringers—all of them what are technically called intercostal; and they extend 14 inches inside of the main frames. There is an open-

1912 ing in what is termed each frame space about 4 inches by 9, that being the size of the frame also. These intercostals are formed of very wide plating. In this case it would be about 24 to 26 inches, I should think, in width. Attached to the side of the vessel, the side plating of the vessel, the frames of the vessel, are what are called angle irons; and on the inner edge of this plate there are two angle irons, called—well, they may be termed face angle irons. That completes the arrangement of the stringer.

Q. By the inner side of the plate I assume you mean the part—— A. In the hold.

Q. How far do the perpendicular beams project into the hold on the skin of the ship? A. They are horizontal—the stringers are horizontal.

Q. But I want to get at the other frame plates. A. The frames?

Q. Yes. A. They are 9 inches.

Q. So that the stringer plate projects out into 1914
the hold how many inches further than the frame? A. I think about 14 inches.

Q. What is the thickness of that plate? A. 5/8 of an inch—from 5/8 to 11/16 of an inch.

Q. From the between deck to the bottom of the ship, how many stringer plates are there? A. There are three.

Q. About how far apart are they? A. May be 6 feet apart, perhaps; I didn't measure them, but I should judge they were about 6 feet. 1915

Q. Are there any openings in this stringer plate by which water can drain down, if any water got down in it? A. The openings in each plate.

Q. How about the ends of the hold? A. The ends of the hold are the same way. The stringer plate passes right through the hold, and is fitted in the same manner as the hold itself.

Q. When you come to the deck, how is it fitted there? A. There is what is called a collar, to make the bulkhead water-tight; but there is an opening 1916
in the frame, and it is the same.

Q. Was there any evidence around the edges of those stringer-plates, or behind them, of the accumulation of sea water on them during the voyage? A. No. There was not.

Q. Was there any indication on the sides of the ship of leakage, draining? A. No. There was nothing there to show that there was any leak there at all, either from the side of the vessel, or any part of her. Just on some of the stringer

plates there was a little water dampness, you might call it, just lying on a part of the stringer plate, which I assumed to be part of the condensation.

Q. You spoke of the under side of the deck being rusty. Was the rust of such kind as would result from the leakage of sea water from the deck? A. No. It was away from the side of the
1918 ship. It was not that kind. It was just as you see drops on a ceiling occasionally, you know, covered with drops. That was from condensation of air. Had it been caused by running water—a leak, for instance—it would have been a very different kind; it would not collect in that way.

Q. Will you explain in a little more detail the test you made of these scupper pipes? A. The wood casing of the pipes was all taken away. The pipes in themselves were examined from the top to
1919 the bottom. After that, the lower ends were plugged up, and the pipes filled with water, to test not only the condition of the pipe, but to see whether any leakage arose from them. That was done, and the water allowed to stand in the pipe for quite some time, perhaps maybe an hour, to see if there was any drainage even; and while that was in operation, my hand was passed up and down the inside of the pipe, to see if any dampness came from there. And, in the end, I was
1920 perfectly satisfied that there was no leakage whatever from the scupper pipes.

Q. Does that test apply as well to the connection for the pipe through the deck where it was flanged on at the top? A. Yes; precisely the same thing—the pipe and its connection.

Q. Was there any evidence that there had been any leakage through the upper deck? A. No. There was nothing but what I have just described —little rusty places.

Q. Did you examine the ship on both sides in the hold? A. Yes, on both sides.

Q. Are the pipes on both sides, or pipes all on one side? A. I examined both sides of the boat.

Q. As a result of your examination, will you state your opinion as to whether it is possible that cargo stowed in No. 3 lower hold of that vessel could have been damaged by sea water leaking into the hold? A. I would unhesitatingly say it 1922
was physically impossible.

Q. You are going away to-morrow, I believe, on a voyage to Europe? A. Yes, I am going on the "briny" to-morow.

Q. And how long do you expect to be gone? A. About 3 months.

Q. Over June, anyway? A. 3 months.

Q. When you made this examination did the sides of the vessel on the deck indicate that it had been swept down, or cleaned up, after the car- 1923
go had been taken out, and before your examination? A. No.

Q. What was the appearance of them? A. As if the cargo had just been discharged—the vessel left like that.

Cross-Examination by Mr. Thacher:

Q. But prior to your first visit of July 26th had you made any specific examination of this No. 3 1924
hold you have mentioned? A. Not prior to that date; no specific examination.

Q. Had you been in No. 3 hold at all to examine before that? A. I don't think I had been.

Q. You speak of having seen some rust stains on the undersides of the decks? A. Yes.

Q. In your experience, have you any reasons to determine whether those stains were caused by fresh water or salt water. A. No. I couldn't tell that. That would require a chemical analysis to determine that.

1925

Q. How do you know whether any repairs had been made in No. 3 hold prior to your first visit there, and after the arrival of the *Folmina* in New York? A. Because I had been following up the *Folmina* for another purpose, and if any repairs had been made I should have been sure to have known it. She happened to have considerable damage in the East River in May, and I surveyed
1926 her in May for this very damage, and I was following the ship on account of this from time to time.

Q. You are speaking of marine damage? A. Yes. That was in May; and I had the vessel from that time all the time up to this period. So if there had been any repairs going on I must have seen them, and should have known of it; and it could not have been done without my knowing it.

Q. How would you have known whether the offi-
1927 cers of the ship had made any minor repairs in that hold? A. The officers of the ship don't make minor repairs in the hold.

Q. That is a mere conjecture? You can't state positively they did not? A. I could say so, because it is never done. I never saw an officer of a ship make a repair yet. Besides, I may add to that that in making a repair indications are left there that the repair has been made. A disturbance is set up in the local parts which you cannot
1928 make any mistake about. A man cannot cover it by paint even—then it shows itself just as readily.

Q. Would the mere tightening of a rivet be visible? A. You can't stuff rivets. If a rivet is leaking you ought to take it out and put a new one in. And that is readily seen. And if there is any calking done, that is as easily seen. You can't hide it.

Q. Did these stringers that you mention in the lower No. 3 hold have the same sheer as the deck?

A. Yes, just the same. They follow along parallel with each other.

Q. Which way was that sheer? Fore or aft? A. Which way?

Q. Was the sheer?—Did they dip toward the engine room? A. They would naturally be a little hollow—the sheer.

Q. In addition to the openings for the perpendicular frames, were there any openings in these 1930
stringer plates? A. No. It is not usual to have them there.

Q. Were these openings through which the vertical frames pass through the stringer plates tight? A. The holes were not tight. There are holes purposely left.

Q. Around the frame? A. Around the frame. I will explain to you. Where the frames are vertical they have what are called rivet bars on them. You could not fit a horizontal frame in these tight. 1931
Therefore you have to fit one side tight, and leave the other open. It is practically impossible to fit a plate around that pipe.

Q. In your examination of the sides of No. 3 hold, did you test different rivets, or did you just make a visual examination of the subject? A. No. I carry a hammer and what is called a test knife; and I take the hammer, and I can tell by striking a rivet. I take my tests, and go along the seams so (witness illustrating). 1932

Q. Do you mean you have tested every rivet? A. No, I would not like to say that. Sufficient, simply, of them to satisfy me that there was nothing the matter with the riveting.

Q. You might have escaped one rivet that was loose, might you not? A. If there had been a bad rivet it would show itself. A leaky rivet would show itself.

Q. You mean the rivet would have had the appearance, or there would be signs of leakage

around it? A. There would be evidences around it. Then usually where a rivet leaks there is oxidation set up; and whether she is carrying sugar, or rice, or what not, there is a trace of this cargo gathered around it, and you see at once what there is. In ordinary testing you find evidence of slack, but rivets you do not find slack. It has not the solid sound that a firmly fixed thing would have.

1934 Q. Did you observe the rivets near the decks—what they call the shell rivets back of the stringer? A. Yes. That is what I mean by shell rivets.

Q. How about the rivets back of the stringer on the side of the ship? Aren't those difficult to reach to test? A. No, not always. Because the stringer is usually fitted in the middle of the plate, as near as can be, leaving one edge above and one edge below, so that you can get at those rivets. There is also at the end of the ship, where the

1935 stringer is greater in the inside than the outside, where the stringer will get beyond the line of riveting; but if it is bad it will soon show.

Q. In the absence of such indication to the eye, there was nothing to show they were bad or loose behind the stringer? A. No. Only what you can see. But there is so little of them, it doesn't give any trouble about it, because the rivets are always a little above and below the edge of the seam rivets.

1936 Q. You made no test whatever to see whether such dampness or condensation which you saw was salt or fresh, did you? A. No.

Q. Did these stringers have any flange or raised edge to them? A. There were two angles on what is termed the inner edge of the stringer. I will show you the form, like this. (Witness illustrating.) 5/8 to 3/10 in thickness.

Q. You say you found some dampness on these stringer plates? A. Dampness.

Q. Yes? A. Yes.

Q. Did you make the same examination on the port side of No. 3 that you did on the starboard? A. I examined both sides very carefully. Because when I was asked to go there to make this survey I did not know which side the damage was. So I made sure of it by going to both sides.

RE-DIRECT.

Q. If the rivet in the side, or in the shell plating, as you call it, leaked sufficiently to admit a quantity of water such as would do damage to cargo, would it leave any mark behind it? A. Oh, yes, it would show instantly on the inside.

Q. What would be the evidence that would be left behind such a leak? A. You see rust or whatever cargo she was carrying all stuck up to the side of the boat.

Q. Would there be any streak down over the plating? A. A line of rust and stuff.

Q. Where the water would go down? A. Where the water would go down, yes. I have seen grain stuck up as big as your leg. I have seen grain in the way of a leak on the side collected there as big as your leg.

RE-CROSS.

Q. That was because it was in bulk, and there was no dunnage between it and the skin of ship? A. It was bulk grain.

Q. Wouldn't it be, perhaps, perfectly possible to clean such stains as you have described away? A. You couldn't clean it away.

Q. I mean without taking the rivet out, couldn't you perfectly easily clean away such stains as you have described around the rivet on the shell? A. No. From the very fact that if you clean away part you do not clean the whole thing—it shows itself that you have cleaned it.

Q. That would depend upon how it was cleaned?

1941

Robert B. Miller.

A. You can't get out of it. If you have a plate as long as this table—there are plates the length of this (witness indicating), and if I have cleaned one place where there has been that, if you are a surveyor and come there, you could spot it in an instant. And if I had an old plate there, you say, "You have put a new plate on it. What have you been doing?" You become suspicious at once.

1942

Claimants' Case.

Mr. Kirlin: I offer in evidence the testimony of the ship's witnesses, (all in one bundle) being the depositions, and the various exhibits referred to therein, as follows:

Garrett W. Carst.
1943 Lendert Eberts, second engineer.
Klass Deboer, second officer.
Wilhelm Eyken, master.
Thomas Congdon, Lloyd's surveyor.

Robert B. Miller, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. In May, 1901, were you one of the port
1944 wardens of New York? A. I was.

Q. How long have you been port warden? A. I had been then about five years.

Q. What were your general duties in connection with the discharge of vessels in your district? A. On the arrival and reporting of vessels at the pier it was my duty to take each and every separate district that was assigned to us—there were seven—each to take his district and go over it and look at the vessels upon arrival and continue the service until those vessels were discharged in his district.

Q. Was the *Folmina* in your district? A. It was.

Q. Did you survey the vessel before she began to discharge and during the course of the discharging? A. Upon the vessel coming to that pier in the East River I went there in the morning and, as it was my usual duty to, asked for the first officer or the captain and to have the hatches opened for inspection whether any damage could have occurred on the voyage by the seas.

Q. Did you do that? A. I did.

Q. Did you see the hatches lifted? A. I did.

Q. Was there any damage around the hatches? A. Not to my recollection on that ship.

Q. Did you see the cargo discharged from the between-decks? A. I did.

Q. Was there any damage in the between-decks at all? A. The vessel, as I remember, was in very good condition of the forward hatches, and the one morning that I—Mr. Van Valkenburgh the clerk asked me to come aft to No. 3 hold and examine some rice that was apparently damaged; I went to the bridge deck of the ship, to the after part of the vessel, and looked down into that hold, I saw some rice that was pointed out to me as being apparently damaged.

Q. Where was that? A. That was in No. 3 hold.

Q. In what part of the hold? A. It was about abreast of the hatch.

Q. How far down? A. It was below the between-decks, it was in the lower hold.

Q. How far down below the between-decks? A. Oh, probably 4 or 5 feet below the between-decks in the lower hold.

Q. In what part of the hold was it? A. About abreast of the hatch.

Q. On which side? A. On the starboard side of the ship.

1949 Robert B. Miller.

Q. Did you go down? A. I went down in that hold.

Q. State what you saw? A. I found some of the bags discolored and to my best judgment they were damaged by sweat that had accumulated probably in the sides of the vessel, and the cargo itself being of a warm character it damaged it, the cargo being of a character that would take the sweat.

1950 Q. Describe a little more particularly what you mean by that? A. I mean that rice is a vegetable and will absorb sweat more easily than some other character of vegetables.

Q. Did you take any particular notice of whether the cargo was heated at all? A. It seemed usual, I don't think there was any extra heat as my memory serves me.

Q. Do you remember whether the cargo had been discharged down to the level of the stringer-
1951 plate at that time? A. I should judge about that level. I wouldn't take, didn't take an exact measurement but it would be about the level with that stringer plate, along between 3 and 5 feet I will say, somewheres, that you could stand up by slightly bending over, in the hold.

Q. Can you state from recollection about what was the longitudinal extent of this condition of the rice to which your attention was drawn? A. The main damage that I had perceived would seem to
1952 extend in the immediate vicinity of abreast of the hatch, maybe 10 or 12 feet, say 10 feet.

Q. Was there any scupper-pipe anywhere near that? A. I didn't notice the scupper-pipe, if any.

Q. Did you have your attention drawn to the condition of the rice later on? A. I watched that rice constantly until it was finally discharged.

Q. How far down did the condition you have described extend? A. It did not extend to the bottom; probably not over three tiers of bags down according to my recollection of it, and when the

rice was discharged in the bottom I finally looked at the bottom to see that there was no difficulty in the bottom.

Q. Was there any? A. There was not.

Q. What was the condition of the rice that came out of the bottom? A. The rice was sound that came out of the bottom.

Q. Was your attention drawn to any damage of any kind on the port side? A. There was some 1954 slight damage.

Q. What kind of damage was that? A. Of the same character, of sweat, in my opinion.

Q. In what part of the hold? A. That was in the same position on the other side of the ship, on the port side.

Q. Was there any difference between the two kinds of damage? A. None.

Q. How were both caused in your opinion? A. In my opinion, which was expressed to Mr. Van 1955 Valkenburgh at that time, it was caused by sweat.

Q. You heard Mr. Davis's testimony, did you? A. Yes, sir.

Q. You heard what he said about the accumulation of water? A. Yes, sir.

Q. State what your experience has been as to whether sweat can accumulate? A. My experience with those vessels coming from the warm climates, and particularly of iron vessels, is that there is always an accumulation of sweat on those 1956 stringer-plates.

Q. To what extent have you noticed it? A. I have sometimes seen it where there would be two or three inches of water lying on the stringer-plates.

Q. What is the custom about dunnaging those stringer-plates? A. Putting what material of dunnage—either bamboo, matting, boards, anything they may have at the port of shipment—to

1957 Robert B. Miller.

dunnage those stringer-plates from damaging the cargo.

Q. To keep the cargo off those plates? A. To keep the cargo off those plates.

Q. State how these were stowed and dunnaged, the bags of rice, on the stringer-plates or near them? A. The stringer-plates had the usual dun-
1958 nage of boards and matting on them, that is to say, they were covered and not in contact with the cargo.

Q. Did you see into the stringer-plates yourself at the time the cargo was being landed? A. As the cargo was discharged those dunnage mats and boards were partially removed and I did see into them.

Q. To what extent was there any evidence of sweat there? A. From my recollection there was but very little evidence of water in those stringer-
1959 plates, any more than is usual in all vessels of that character, we expect to see rusting or showing of water on those stringer-plates.

Q. What is your judgment as to the quality and sufficiency of the dunnage that was on those stringer-plates? A. It was usual, sufficient.

Q. State your judgment generally with regard to the stowage and dunnage of the cargo? A. I saw no exception to take to the cargo.

Q. How often do you have rice cargoes under
1960 your supervision? A. Rice cargoes—I will qualify that, it comes with other cargo occasionally, not always.

Q. Cargoes of which rice forms a part? A. It does not come in every cargo, only partially. Oh, I have had a number of vessels within the five years.

Q. Is it any more susceptible to moisture than general East India cargo? A. I think it is.

Q. Tell us how the stringer-plates and mats and dunnage on the port side abreast of the hatchway

appeared as compared with those on the starboard side? A. My examination was cursory. I found the conditions on both sides about the same, I don't remember any particular condition different from usual.

By the Court:

Q. It doesn't help us much to say "different from usual;" how did you find them? A. In good 1962 order.

Q. The question is whether the dunnage and matting were wet? A. There is always a slight——

Q. I don't care about that. A. There was a slight dampness to the dunnage.

By Mr. Kirlin:

Q. In iron ship from China carrying general cargoes state how you usually do find the dunnage along down the ship's side? A. I find most 1963 always that there has been some settling of sweat when they come from the warm climate and that there has been some mouldiness to dunnage mats.

Q. Did the possibility of this damage being due in any way to sea water cross your mind while you were working on the ship? A. Yes, sir.

Q. Did you make any examination to see whether it might have been caused by sea water? A. We made all the customary examination. I looked at the bagging and took some out of it and I 1964 found no trace of sea water on it.

Q. What examination or trial did you make of it? A. The usual one of putting the pieces of bagging out in water with a test of nitrate of silver for the salts.

Q. Describe that test? A. That test is simply placing the bagging in a glass of water and adding to it the test mixture which is made—a few drops of test mixture which is made of nitrate of silver I understand, I am not a chemist, that is

the preparation that is supplied to us in the office of port warden.

Q. And if there is sea water damage on the subject that you apply the test to what result do you get? A. It will show a white precipitation in the water, a precipitation of salts.

Q. What was the result of the tests? A. It was clear.

1966 Q. From which side and what place did you take the bagging that you subjected to that test? A. I took it from the starboard side of the ship where I first saw it.

Q. Did you examine the sides and deck of the ship? A. Yes, sir.

Q. Was there any evidence of there having been any leaks? A. I saw no evidence of leak. I saw evidence of moisture and sweat.

Q. Was there any damage in the between decks 1967 of the No. 3 hold? A. I saw none. My attention was not called to any damage in the ship until the lower hold had begun to discharge.

Q. Do you remember what cargo was in the between-decks? A. Those cargoes—I don't specifically. Those are general charges and the rice is stowed in the bottom.

Q. Did you make a report on this survey at the time? A. At the time; we make reports to ourselves, I survey the ship and my reports are made 968 in the office.

Q. You preserve it in the office? A. Yes, sir.

Cross-Examined by Counsel for Libelants:

By Mr. Brown:

Q. Have you produced that report? A. I am no longer a port warden, I did not produce the report, I have no right to it.

Q. Have you a copy of it with you? A. No, sir.

Q. Do you know what is in it? A. The reports, if I may specify what the reports are, are books

in which we enter every day the surveys we make. Those are matters of public record and are open for inspection. I am no longer port warden and I have no right to take that book from the office.

Q. Have you examined that book in the office within the last few days to refresh your recollection? A. No, sir; I haven't seen that book since I left the office as port warden about a year ago.

Q. Did you say anything in your report about 1970
sweat damage? A. That is my recollection of it.

Q. Before you were appointed port warden what was your business? A. I was in the shipping business in the Produce Exchange.

Q. You had no nautical experience before that? A. I had been brought up from a boy in the shipping and commission business.

Q. You didn't sail on board ships, you know nothing about ships? A. I know considerable about ships. I didn't serve in the capacity of 1971
officer.

Q. Where did you acquire your knowledge of ships? A. From my experience as a boy up and being both in loading and unloading and in charge of such matters for the firm I represented.

Q. You mean you represented the consignees of cargo? A. I represented the consignees of cargo and agents of the vessel.

Q. You would go down and see the cargo discharged. How large was your district as port 1972
warden? A. My district as port warden frequently covered the sugar district as we called it. My own district was from Grand Street, New York, down to Pier 38. When my associates or any of them were absent I frequently did their duty, and that frequently occurred that I did it in the sugar district which took in Hunters Point, Greenpoint and Williamsburgh and also from Wall Street Ferry down to and through Atlantic Dock, which made me doing often three men's work.

1973 Robert B. Miller.

Q. Your own district was exclusively Manhattan Island? A. My own district was exclusively Manhattan Island.

Q. At the time you examined the *Folmina* you were doing extra work? A. I was doing extra work.

Q. Were you doing three men's work at that time? A. I wouldn't say positive; I was positive-
1974 ly doing two men's work, doing my own and doing district work from Wall Street Ferry to South Ferry and Atlantic Dock—yes, that was three men's work.

Q. How many vessels were there discharging in those three districts at the time the *Folmina* was discharging? A. I couldn't answer that question.

Q. Can you give an opinion on the subject? A. There might have been ten possibly.

9175 Q. You gave them all the same attention as the *Folmina*? A. Always.

Q. Did you see each of them every day? A. Every day.

Q. Did you make any examination of the damaged rice on the *Folmina* until requested to do so on behalf of the ship? A. Yes, sir, immediately when I saw the damage.

Q. When did you see there was damage? A. When it was reported to me, at the time they had
1976 gotten to the lower hold there discharging.

Q. You knew nothing of any damage until it was reported to you there was damage? A. If I may qualify the method—my examination of a cargo, I would report to the ship and it is always my duty to inquire of those in charge, whoever they may be, what there is that might be damaged or to be looked at.

Q. Do you mean before the hatches are taken off? A. Both before and after, at any time.

Q. Are you sure you were on the *Folmina* when the hatches were taken off? A. Absolutely.

Q. What day was that? A. I couldn't remember the day, but I can specify the ship because it was the last ship I surveyed as port warden and my knowledge of it is complete.

Q. You lost your position as port warden immediately after? A. The Government appointed another man to succeed me on the expiration of 1978 office on the 18th day of May and I did not go out of office immediately after.

Q. What time of day was it those hatches were taken off? A. At the present time I couldn't recollect.

Q. Who was present when they were taken off? A. It was my duty to ask for the chief officer I presume, or captain, I presume he was the one.

Q. Do you remember who was present when the hatches were taken off? A. Either the chief 1979 officer or captain.

Q. Do you remember which? A. I couldn't specify specifically.

Q. The question is do you remember? A. I say I remember them taking off those hatches.

Q. Do you remember whether the captain was present? A. I couldn't remember whether it was the captain or chief officer.

Q. Is it the practice of vessels to wait until the port wardens come before taking the hatches off? 1980 A. Almost invariably on such cargoes. If I may explain, those vessels are not usual to discharge immediately upon docking and there is ample time for an examination.

Q. How many times were you on board the *Folmina* before the time you went in response to the report there was damaged cargo on board? A. I didn't go on report there was damaged cargo.

Q. Didn't you say it was reported to you there was damaged cargo? A. While I was on the ship.

1981 Q. Prior to that time how many times had you been on the *Folmina*? A. I couldn't say. Possibly three or four days.

Q. Had you gone down into the hold each time? A. I looked in the hold of the forward compartment first and there was no damage reported or no damage existing and I did not go into the hold until the damage of rice was reported.

1982 Q. You say until this damage was reported you had looked into the forward hold, each time you had been there? A. Yes, sir.

Q. That is, you stood on the main deck and looked down through the hatch opening? A. Yes.

Q. Up to that time you hadn't looked down the after hatch openings? A. Yes, I had; I examined all the hatch openings when they were opened.

Q. You looked down from the main deck? A. From the main deck.

1983 Q. Do you keep any notes in addition to your official report? A. Nothing.

Q. How is your official report made up? Is it from your recollection? A. The number of vessels that were surveyed per day ——

By the Court:

Q. How do you make it up? A. From recollection.

1984 By Mr. Brown:

Q. You don't keep any notes? A. Nothing.

Q. Do you make up at the end of each day? A. Immediately on arrival at the office during the day.

Q. Once a day? A. Once a day.

Q. When the damage was reported to you what did you do? A. When the damage was reported to me I went and looked at it.

Q. You stood on the main deck and looked down the hatch opening? A. I was standing on the

bridge deck and looked at it and then went into the lower hold and examined it at that time. 1985

Q. How did you get into the lower hold? A. The usual way, by the companion way, ladders.

Q. Was there any cargo in the between-decks at that time? A. The cargo had been discharged practically at that time.

Q. The between-decks was empty? A. I couldn't say it was absolutely empty but essen- 1986
tially so.

Q. Have you any distinct recollection how the between-decks looked? A. The between-decks was essentially empty.

Q. There may have been some little cargo left? A. Possibly a little; it is usual to leave a few packages of something and then go to the lower hold.

Q. You went into the lower hold? A. Yes, sir.

Q. When? A. A few days after the vessel be- 1987
gan to discharge, it might have been three or four or five days, I couldn't recollect just exactly.

Q. What did you find the condition of things—how much cargo was there in the hold? A. The hold was well filled; it had been broken away maybe two tiers of bags of rice.

Q. Level all the way across approximately? A. Approximately.

Q. You think only about two tiers? A. It was in abreast of the hatch, maybe two or three tiers, 1988
about three I should think. It was sufficient for me to go down and examine.

Q. Did you have to stoop in walking on the bags? A. At that time partially.

Q. There wasn't room enough to stand erect? A. Not quite. I am pretty tall and naturally have to stoop some.

Q. Could you walk on the bags all the way to the wings? A. At that time I could, yes, sir.

Q. Did you walk to both wings or only to one?

1989 Robert B. Miller.

A. The first day I walked to the starboard wing, the second day I looked at it I walked to the port side.

Q. Why did you walk to the starboard instead of the port? A. Because that was the first discharged.

Q. You said it was approximately level all the way across. Do you wish to qualify that? A. I
1990 qualify that approximately; there may be a bag here and there. The damage on the port side wasn't called to my attention at that time, there was subsequently some little; the damage wasn't on the port side.

Q. The first day you knew nothing of the damage on the port side? A. The first day showed damage on the starboard side.

Q. And you knew nothing of any damage on the port side? A. No, sir.

1991 Q. And you saw none? A. And I saw none.

Q. What was the condition of the bags on the starboard side? A. The bags on the starboard side were stained and showed probable sweat damage.

Q. They were decidedly wet, weren't they? A. No, they were not, they were stained.

Q. How far inboard from the skin of the ship did the damage extend? A. I think maybe 4 or 5 feet from the sides of the ship.

1992 Q. Which way was the cargo stowed—the bags lengthways or athwartship? A. I don't remember that now; I suppose lengthways. I wouldn't say positively.

Q. How many rows of bags inboard from the skin of the ship did the damage extend? A. Oh, three or four rows.

Q. Did you find the bags wet completely around or only on one side? A. The bags were wet and stained uneven.

1993

By the Court:

Q. Did you say they were wet? A. Had been wet, and stained, or stained from the wet.

By Mr. Brown:

Q. The damage was uneven? A. Uneven.

Q. Did you open any of the bags? A. I cut some of the bags.

Q. Did you find moisture had penetrated to the interior? A. Slightly. 1994

Q. Hadn't it gone down to the center of the bag? A. Not then that I saw.

Q. How many bags did you examine? A. It was usual for me to examine five or six bags, take samples in that way, and that was taken on an average as a sample of the conditions.

Q. Were any of the bags broken? A. I don't remember any chafing or breaking.

Q. Were they still discharging while you were there? They discharged all the while until the end. 1995

Q. Did you see any break in the sling? A. That may be; there were none broken in the slings while I was there.

Q. When you opened the bags wasn't the rice caked? A. I didn't open them, I simply cut the bagging from off the outside.

Q. That exposed the interior? A. That exposed the interior.

1996

Q. You didn't dig down into that rice? A. There was no need of digging, the rice was usual.

Q. Did you? A. No, I didn't take that. I took the bag to see if there was any damage penetrating to any great extent.

Q. Did you find the rice caked? A. I did not.

Q. The extent of your examination on the first visit was to look at five or six bags? A. The extent of my examination on my first visit was to

1997 look at all the bags and to cut five or six for analysis.

Q. Did you feel with your hand more than five or six? A. I looked at it all.

Q. (Repeated.) Did you feel with your hand more than five or six? Please try to answer the question. A. I don't know that I did.

1998 Q. Could you see the bags in the port wing without walking over to it? A. From abreast of the hatch, yes.

Q. Could you see the bags were not damaged in the port wing on that first visit? A. There was no show of damage there.

Q. When did you next make examination? A. I made it every day until the vessel was discharged.

Q. What was the occasion of your first making an examination of the port side of the hold? A. My attention was called to it.

1999 Q. By whom? A. By the clerk Mr. Van Valkenburgh who was present.

Q. How long was that after you first walked over to the starboard wing? A. The following day I believe.

Q. What did you find the condition of things in the port wing? A. Only slight damage there.

Q. That day you went down in the hold and walked over on the bags to the port wing? A. I was in the hold twice, both the time my attention

2000 was called to it first and the following day or two days thereafter, I wouldn't say positively which.

Q. Only on those two occasions? A. Only on those two occasions.

Q. The second time you went down you found some trifling damage on the port side? A. That is my recollection of it.

Q. By "trifling" damage do you mean it affected more than two or three bags? A. I couldn't say how many; it was more than that according to my recollection.

Q. How many? A. It might have been a dozen or fifteen bags that were slightly stained.

Q. Much slighter damage than you found on the starboard side? A. It was slighter damage.

Q. You have spoken of making some tests. When did you take the samples of bagging from which the tests were made? A. The day my attention was first called to the damage on the rice.

Q. You took no samples on the second day? A. 2002
I did, from my recollection.

Q. When did you make the test? A. The same day I took the samples.

Q. You made the test on two different days? A. On two different days as I remember it. I pronounced the second day sweat which brings to my mind that I did make the test.

Q. It was the second day samples you pronounced sweat? A. I pronounced it sweat and so informed Mr. Van Valkenburgh the clerk. 2003

Q. How many bags did you take from? A. It is my usual custom to take five bags. That is considered an average on all such occasions.

Q. How many did you on that occasion? A. About five bags; that was my usual habit.

Q. Do you remember whether you followed your usual habit that day? A. I did.

Q. Were those bags you took samples from those that were next to the skin of the ship or inside of those? A. Bags that were probably 2004
three or four rows from the skin, and in and around generally; wherever I could so take the best judgment I cut samples; generally the most pronounced damaged are those I sampled.

Q. You have testified that you saw the rice on cutting the bag? A. Yes.

Q. Isn't it true when you saw that rice it was because you cut out a piece of bagging to test? A. Exactly.

2005 Robert B. Miller.

Q. It was only in cases where you took samples from the bags you saw rice behind? A. That is all.

Q. Each of those five or six bags the rice behind the particular piece you tested was not caked? A. I saw no caking.

Q. How much experience have you had with cargoes of rice? A. I have had almost the entire,
2006 about all the Chinese vessels and cargoes, and Japanese, that came to the port while I was port warden, being on those districts where most of the vessels go and assigned to other districts where they go. Rice cargoes are not general.

Q. How many shipments of rice have you inspected during your term as port warden, about? A. I couldn't say specifically but there has been rice on many different ships, I wouldn't say whether a dozen or 20, there has been a number of
2007 them.

Q. Give me a few instances, please? A. I couldn't specify particular vessels, but I have had most all of the Chinese and Japanese vessels.

Q. Can't you remember by name a single vessel which you examined and which contained rice? A. I wouldn't and couldn't.

Q. Do you remember to have ever examined a vessel containing rice upon which a claim was made for damage either sea water damage or
2008 sweat damage? A. I don't remember.

Q. Has it ever occurred? A. I don't remember.

Q. It may or may not? A. It may or may not. Claims are frequent in our office and I can't tell what.

Q. Have you ever examined a vessel one hold of which was entirely filled with rice, outside of the *Folmina*? A. Not to my recollection.

Q. What was the level of the cargo upon the second occasion when you went down in hold No.

3? A. So I could get around about comfortably.

Q. At that time you could walk without stooping? A. Without stooping.

Q. Did your head come pretty near the beams? A. Well free from it, that is all I can say.

Q. What is your height? A. 5 feet, 10 inches.

Q. Do you rememer distinctly to have seen the stringer-plates on either side of the vessel? A. Yes, sir.

Q. Which time did you see them? A. Both times that I was in that cargo and looked at the hold when everything was out. If I may specify the reasons, a very peculiar condition occurs. This vessel was damaged by collision and it required attention to her constantly on account of possibility from damage from that source.

Q. When did the collision damage occur with reference to the discharge of the cargo? A. It occured while they were discarging that as I remember.

Q. Did it occur after the two occasions you went down in No. 3? It occurred after that.

Q. And before they finished discharging the cargo in that hold? A. Before they finished discharging the cargo in that hold.

Q. How are you compensated for your work in examining vessels? A. By fees of surveys.

Q. Each vessel pays you a particular fee? A. The surveys are two dollars each, and we are limited to seven surveys to a ship.

Q. Each time you go you receive two dollars for your examination. Is that right? A. No, we may go two dozen times but we only receive fourteen dollars.

By the Court:

Q. Is that paid to you? A. It is paid into the general fund and we receive our proportionate part; it is divided by nine port wardens.

2013 Robert B. Miller.

Q. Do you collect that directly from the ship? A. The colector representing the port collects that from the agent of the vessel.

Q. You don't collect that directly? A. I never collected anything as port warden.

By Mr. Brown:

Q. Do you have a salary? A. The fee is divided
2014 into nine parts.

Q. Are there nine port wardens? A. Nine port wardens and each had his ninth.

Q. Don't you ever receive extra fees? A. None.

Q. You did some unusual work on the *Folmina*, didn't you? A. No, sir.

Q. You went there a great many times, didn't you? A. That is usual.

Q. Didn't you give a special attention to this damage? A. No, sir.

2015 Q. Haven't you received more from the owners of the *Folmina* than your proportionate part? A. I have received nothing from the owners of the *Folmina*.

Q. When you went down on these two occasions in the hold how long did you stay there? A. Possibly ten minutes.

Q. You can't give us with any degree of approximation the date you went or what time of day it was? A. In the forenoon, my regular de-
2016 tour.

Q. Did the captain go into the hold with you? A. One of the officers and Mr. VanValkenburgh went there with me.

Q. Each time? A. Each time as I recollect.

Q. Whether it was the captain or not you can't say? A. I can't say; it was probably the first officer. The captain was there—my recollection of him is specific—I remember Mr. VanValkenburgh and one of the officers and I were together.

2017

By the Court:

Q. Who is Mr. VanValkenburgh? A. Clerk of the ship discharging cargo, representing the consignees.

Q. Is he part of the ship's crew? A. No, sir, he is the discharging clerk.

Q. He is a landsman who comes abroad the ship during the discharge? A. To check and take care of the cargo.

2018

By Mr. Brown:

Q. Is it your testimony you never carry a memorandum book? A. Yes, sir.

Q. You testify you never do? A. Yes, sir.

Q. You had considerable experience in sweat damage I suppose? A. Considerable.

Q. Isn't it a fact that sweat damage shows itself almost necessarily below the deckbeams on top of the cargo and upper tiers of cargo? A. Not necessarily. Blowing, and by the rolling of the ship and vessel siphoning, as Mr. Davis called it, it is just as pronounced.

2019

Q. You don't call siphoning sweat damage, do you? A. Siphoning of sweat is, yes, not siphoning of sea water.

Q. Where does the water come from that siphones? A. From the beams, frequently, on the side of a vessel, which I have oftentimes found two or three inches of water, of sweat settling on those beams.

2020

Q. Where are the beams on which the water settles? A. On the beams on the side of the stringers so called, on the side of the ship.

Q. You don't mean the main-deck beams? A. I don't mean the maindeck beams, I mean the stringers.

Q. What case can you give me in which sweat has ever settled to a depth of a couple inches on the stringer-plates? A. Frequently. One particular ship at the sugarhouse— I can't remember her

name now—I recall it specifically, one. You asked specifically for a ship, I can't remember her name, she was at Havemeyer's Sugarhouse; I have seen dozens where there was sweat on the side, you asked for one and I name it.

Q. I am speaking of two inches of water in the channel of the stringer-plate attributable to sweat? A. That one paricular case in the sugar-
2022 house district, I forget the name, that is the one I remember. I don't recall to mind any other but I have seen sweat on those stringer-plates.

Q. In that particular instance you don't remember the name of the vessel but do you remember when she arrived? A. Covering a period of five years it is difficult. It was a year or so previous to this cargo.

Q. To whom was she consigned? A. I couldn't answer that question.

2023 Q. Where did she discharge? A. Havemeyer's Sugarhouse.

Q. Where was her cargo loaded? A. In the West Indies.

Q. What did it consist of? A. Sugar.

Q. A full cargo of sugar? A. A full cargo of sugar.

Q. Damage of the cargo on the sides of a ship next to the skin from sweat is extremely rare isn't it? A. No, I don't consider it rare.

Q. Damage to the upper tier next to the deck
2024 beams is the usual place for it, isn't it? A. It is more frequent.

Q. Sweat damage customarily extends to the entire side or entire upper tier of cargo when it exists, doesn't it? A. No, sir.

Q. What is the usual fact? A. It will take streaks; sometimes it will run along deckbeams and settle in that spot or this spot.

Q. Do you mean the rest of the cargo will be dry? A. Yes, sir.

Q. You say you saw water in the stringer-plates

in this ship? A. I did not. I said there was some slight mouldiness of matting, which is usual. 2025

Q. There was no water? A. I didn't notice any water.

Q. Did you look? A. Yes.

Q. You saw no other stringer-plate but the top one? A. I saw all the stringer-plates as the cargo was discharged to the bottom.

Q. Do you testify none showed water? A. Yes, sir. 2026

Q. Did you look? A. Yes, sir.

Q. You saw no water? A. I saw no water except dampness, the usual slight dampness of matting and boards.

Q. Did you make any test of any of those mattings on the stringer-plates? A. No, sir.

Q. Can you state a single date when you were on board? A. I was on every day from the day —if you give me the date of her discharge: I haven't my books before me, they are in the office —every day from the time she came to her pier until she finished loading barring Sundays. 2027

Q. How about stringer-plates? A. I can give you the days I saw the stringer-plates after my going into No. 3 hold.

RE-DIRECT by counsel for claimants.

By Mr. Kirlin:

Q. Did the collision have anything to do with this condition of the rice you saw in No. 3 hold? 2028

Objected to.

A. I watched it carefully, I went aft on the ship and also on the dock to examine how far that collision had damaged the vessel and what the liability of damaging that rice in the lower hold was, and called the attention of the clerk of the boat to it. I found no damage occurring from that collision.

2029

Robert B. Miller.

Q. Do you know Mr. Jahn, the receiver of this cargo? A. Yes, sir, I do.

Q. Did you have any talk with him about this rice? A. Yes, sir.

Q. When? A. On my subsequent trips to the district from Wall Street down to South Ferry, possibly two weeks or more after this. It was just before I left the port warden office.

2030 Q. Did he discuss with you at all, or you with him, the cause of the damage? A. I asked Mr. Jahn—he was standing at the Union Stores delivering his rice to a lighter—I asked him what it meant; he said that he was intending to transship it; I asked him the reason, he said the rice was under color and unfit for this market and had to be transported abroad to get rid of it.

Q. Did he say anything about sea water damage? A. No, sir. He told me that the rice was a

2031 cent or cent and a half a pound poorer than this market wanted.

Re-Cross by counsel for libelants.

By Mr. Brown:

Q. Is it part of your duty to investigate consequences of collision in vessels? A. Where it would affect the cargo that was at the dock or on discharge, conflicting with sea water damage occurring upon voyage, it has been my duty to look

2032 specifically after anything of that kind that might occur on my vessel.

Q. Part of your duty to investigate in causes of damage from any cause whatsoever? A. It is part of my duty to know the exact condition of that ship while she is discharging.

Q. Aren't your duties confined to the stowage and dunnage of cargo? A. Any damage that occurs to cargo on that vessel is subject to the report of the Board of Port Wardens.

Q. You think it is part of your duty to investigate causes of damage? A. I have always done so.

Charles M. Tiffany. 2033

CHARLES M. TIFFANY, being duly sworn and examined as a witness for the claimant testifies:

By Mr. Kirlin:

Q. What is your position? A. Stevedore.

Q. With what firm or company are you connected? A. Atlantic Stevedoring Company.

Q. Is that company engaged in business in New York? A. Yes, sir.

2034

Q. How many years? A. Seven.

Q. What is your position with the company? A. Manager, superintendent.

Q. Before that what had your experience been in the stevedoring line? A. Superintendent for T. Hogan & Sons for 12 years.

Q. What is their position in the port? A. Largest stevedores in the United States.

Q. Have you had experience at sea also? A. Yes, sir.

2035

Q. For how many years? A. 12 years.

Q. On what kind of vessels? A. Steam and sail.

Q. Were you an officer when you left? A. Yes, sir.

Q. Did you have personal supervision or control of the discharge of the *Folmina* for the Atlantic Stevedoring Company? Yes, sir.

Q. I believe she had a collision during the time she was in port? A. Yes, sir.

Q. Had she begun to discharge at the time? A. 2036
Yes, sir, about half out.

Q. Where was she lying? A. Pier 30, East river.

Q. Made fast to the pier when the collision occurred? A. Yes, sir.

Q. Did she continue discharging her cargo? A. Yes, sir.

Q. Was there any damage to cargo in No. 3 hold caused by the collision as far as you know? A. As far as I know she wasn't damaged in No.

2037 Charles M. Tiffany.

3 hold by the collision, it was No. 4 hold; the plates were started.

Q. And most of the damage was on the stern? A. Yes, sir.

Q. Was that collision with a carfloat in tow of a tug? A. Yes, sir.

Q. Something was broken down on the tug? A. I believe the flood tide carried the float in there
2038 and she came onto her; or, coming out of Long Island Railroad dock the tide caught her and swung the bow in there and damaged the stern of the ship.

Q. Do you remember the consignment of rice that came to G. A. Jahn & Co? A. I know Jahn had about 12,000 or 13,000 bags in that ship.

Q. Do you remember in which hold it was? A. No. 3 and 4 in between decks.

Q. In the No. 3 hold do you remember whether
2039 there was any rice in the between decks? A. There was.

Q. In what part of the between decks? A. No. 3.

Q. Was there any damage to that rice? A. Nothing more or less than a little sweat.

Q. Where was that—in what part of the between decks? A. Against the sides of the ship.

Q. What else was there in the between decks No. 3? A. In the between decks No. 3? There was a little general cargo in the after part of No.
2040 3 between decks.

Q. Was there any large extent of damage in any part of that cargo of rice? A. In No. 3 hold on the stringer-plates there was a lot of damage on the starboard side; very slightly on the port side.

Q. How was the cargo stowed and dunnage in that respect? A. It was well taken care of, properly ventilated and matted at the sides of the ship and bulkhead. I think they had six ventilators in the hold of that ship. Carrying rice you know they have to make a special ventilating

2041

system; they ship a lot of the rice that is green and it would heat in the hold and spoil if not ventilated.

Q. Do you remember how many systems or tiers of ventilation there were, of artificial ventilation? A. Ventilators ran clean to the bottom of the ship.

Q. And out through the cargo to the sides? A. Out through the cargo to the sides; both ways.

Q. How many different sets? A. I don't remember exactly, I know she had four ventilators, upright; I don't know in regard to burden ventilators.

2042

Q. In what part of the hold was the most of the damage? A. On the starboard side.

Q. In what part of the hold, fore and aft part? A. On the stringers.

Q. Where with reference to the hatch? A. About the middle of the hatch, from the middle extending aft about 12 or 15 feet.

2043

Q. How far inboard next the cargo did the damage extend? A. Four or five bags in.

By The Court:

Q. How many feet? A. About 12 or 15 feet. A bag of rice is about three feet long, may be a few inches more. I think it was five bags long along the stringer-plates.

Q. How much? A. About two tiers on the stringer-plate and plate below it—just two tiers laying on the stringer-plate.

2044

By Mr. Kirlin:

Q. What was the condition of the rice immediatly under the between decks above this tier to which you now refer which was near the level of the stringer-plate? A. What do you mean?

Q. In what condition was it? A. Some of it was damaged by sweat, some of it good bags. When discharging we don't make any notation of the number of bags, we get it out.

2045 Q. Was there any serious damage until you got down to the stringer-plates? A. The most serious I see I thought would amount to anything was when we struck the stringer-plate I knew it was badly damaged; that cargo was good in the bottom.

Q. And on the port side? A. Slightly damaged on the stringer-plate, but nothing to speak of more
2046 than that general run of cargo at that time of year.

Q. State in what parts of a hold you find in your experience evidence of damage by sweat? A. Do you mean this particular ship?

Q. No, any ship? A. There is more or less damage from sweat in all ships coming here, on the sides of the ship and on stringer-plates. We have very few ships come in here with China cargo that there is not some damage from sweat. I have seen whole cargoes of fire crackers ruined.
2047 It is a long voyage, some of these ships get into heavy weather and more or less sweat is in all ships. The last two ships the last two weeks have had a lot of sweat damage on them.

Q. Did you hear Mr. Davis's testimony? A. Yes, sir.

Q. Did you hear what he said about having seen water in one of the stringer-plates? A. Yes, sir.

Q. State whether in your experience you have found sweat accumulating to that extent on string-
2043 er-plates? A. I have seen a ship come in here with ballast one time and found about an inch and a half of water in the stringer plates, but I never see any ship come in here with a cargo and found water there; but I have found them damp and the mats saturated. I have seen many a ship where you go down into the between-decks and walk around on the between-decks stringer plates, where she is not loaded, and you will find an inch and a half of water in her, that is when she is empty; mats will absorb that water.

By the Court:

Q. You find wet mats I suppose? A. Not generally in an empty ship. The mats are tied up

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By Mr. Kirlin:

Q. Dunnage mats is what we refer to? A. Dunnage is what I have reference to.

Q. About how expensive was this damage; how many bags do you estimate you saw that were damaged? A. About 40 or 50.

Q. In the neighborhood of the stringer plates? A. Something like that.

Q. What was your opinion as to the cause of the damage? A. Sweat.

Q. You say you have seen rice damaged by sweat before. A. Yes, sir.

Q. In the same places? A. On the stringer plates in the between-decks and around the coamings of the hatches where they are full.

Q. Was there any evidence of leakage in the decks of this vessel? A. I didn't examine, I couldn't answer that, I am not qualified to answer, I didn't examine the steamer; I got her out as quick as we could and she went down to the dry dock to be repaired.

THE COURT: How many bags do you claim for, Mr. Brown?

MR. BROWN: 922 perfectly wet with sea water and about 8000 others damaged.

Q. You heard Mr. Brown's statement? A. Yes, sir.

Q. Were you there every day? A. Every day.

Q. Was there any such damage as that on the ship? A. Not at all. It wouldn't exceed, in my opinion, not 600 at the outside that was spotted, of course I kept no count of them.

2053 Charles M. Tiffany.

Q. Do you know Mr. Jahn? A. I am very well acquainted with Mr. Jahn.

Q. Did you have any talk with him about getting this cargo out? A. Yes, sir. It was part of my business to see him to get lighters—they furnished their own lighters for this rice. The first day I told him to send a lighter there, that I was ready to discharge the rice; and I see him that
2054 afternoon again when I came across the ferry and I said, "I want another lighter to-morrow morning. Have you been up to the ship?" I said; he said, "Yes"; "How do you think it looks?" I said; "Well," he says, "I think the stuff is heated."

Q. Will heating of moisture have an effect in the production of sweat? A. It will cause sweat, heat causes sweat.

2055 Cross-Examined by Counsel for Libellants:

By Mr. Brown:

Q. You are a pretty busy man I suppose? A. Sometimes I am; sometimes I have ten ships a week, sometimes fifteen, sometimes two.

Q. How many ships were discharging under your supervision at the same time with the *Folmina?* A. I couldn't tell you without reference to the books in the office.

Q. And you have not referred to them? A. I
2056 have not, no, sir.

Q. Can you state how many times you were on board the *Folmina?* A. On board every day, sometimes twice a day.

Q. Did you go down into the hold every day? A. Every day.

Q. Isn't it the fact that you left the work of discharging the *Folmina* almost entirely to the foreman? A. No, sir, it is not.

Q. You had two foremen in charge of discharg-

ing the *Folmina?* A. I sometimes have one, sometines five.

Q. I am speaking of the *Folmina,* please consider I mean the *Folmina* in what I say. How many men were in charge of the *Folmina* as foremen? A. Two.

Q. Who were they? A. A man by the name of McCarroll and a man by the name of Johnson.

Q. You made a tour of inspection once a day 2058
to the *Folmina?* A. Yes, sir.

Q. Can you remember what day it was you noticed this damage? A. No, I couldn't tell you.

Q. How long was it after the work of discharging began? A. The ship had been discharging about three or four days, about three days I think. A ship don't work full days at the East River piers on an open dock, about four hours constitute a day's work.

Q. At what pier was this? A. 30 or 33. 2059

Q. You can't state? A. I can't tell you without referring to my book. I think Pier 30 as it is now, they have been building new docks within the last year and they are new numbered.

Q. There was no damage to that cargo on the upper tier? A. There were lots of bags there that were stained, I couldn't swear whether they come from the upper tier or middle of the tiers.

Q. You didn't examine the bags that came from the upper tier, you don't know? A. I know I ex- 2060
amined this particular case of sweat because my foreman called my attention to it when I got there in the morning.

Q. So far as you know there was no damage from moisture in the upper tier of bags next to the between-decks beams? A. Not as I see; there might have been but I didn't see it.

Q. Who reported to you there was damage? A. I see the bags coming out of the ship stained.

Q. Was that before you received the report you

referred to? A. It was when I come on top of the bridge and looked over that hatch. I called the foreman and said, "What is the matter?" He said, "Full of sweat on the lower stringer-plates." "Many of them?" I said. He said, "40 or 50." That is the day I examined them. I see some few stained bags going out, you can see a little spot on them of sweat sometimes and merchants take
2062 them and don't say anything.

Q. When you went on board and examined the damage did you find the bags wet? A. I found those in the hold damp.

Q. You wont say they were wet? A. Not exactly. I didn't see whether they could wring any water out of them or not.

Q. Weren't they extremely damp? A. I suppose they might have been. I didn't examine to see how much water was in them, I knew they were
2063 damp but they were not so damp but what they would hold together.

Q. Did some of them fall to pieces when being handled? A. Not that I see. We had coopers there and if a bag falls in pieces it is coopered before they are allowed to go out of the hold.

Q. Who did the coopering for that ship? A. James A. Walsh.

Q. Did you open any of the bags? A. No, sir.

Q. Did you feel of them? A. Yes, sir.

2064 Q. Was the rice caked and hard in them?. A. Rice wont cake.

Q. You didn't find any in which the rice caked? A. Why no. I never knew rice to cake.

Q. You made no test of the moisture to determine whether it was salt or fresh, did you? A. No, sir.

Q. You say the moist bags extended inboard from the starboard side or skin of the ship about four tiers? A. I said three or four tiers.

Q. You said four or five bags. Is that what you intend to testify? A. I said four or five bags long, that is what I mean—12 or 15 feet. I think two or three bags inboard is what I testified.

Q. How many tiers high, one above the other, were affected by the damage? A. I see three tiers; there might have been more or less.

Q. You previously have testified there were two tiers? A. Two or three tiers. Didn't I testify be- 2066
fore two or three tiers?

Q. No, you testified two? A. It might have been two or three.

Q. You don't seem very sure. Did you make a careful examination? A. As careful an examination as I needed to to make any report.

Q. You don't know whether the damage was two or three tiers high or two tiers inboard or five tiers? A. I told you I thought it was two or three inboard and five or six tiers—or four or five tiers 2067
long. I didn't count the number of tiers. I am only testifying according to my observation of that hold as I found it when I went down there; I was down there twice, I was down there that day they got to the stringer-plate and I was down there when the ship was discharged.

Q. The damage on the port side didn't amount to anything at all, did it? A. I didn't see only three or four bags on the port side when I was down in the hold, nothing but what would be taken 2068
—I have seen other ships the same way and heard nothing about it.

Q. There was nothing on the port side a merchant could reasonably make any complaint of, was there? A. It is according to how the market is. A great many times—

MR. BROWN: I want you to answer my question.

THE COURT: That is as good an answer as your question calls for.

2069 Q. At the time you discovered that damage did you carefully examine the place of damage every day? A. No, sir. It was nothing new to me to see damage.

Q. Do you state as your opinion that there were only forty or fifty bags damaged, from your inspection of a single day? A. That is only my observation; there might be 100 or 200 but from
2070 where I saw the sweat I thought 50 would cover it. The clerk of the ship can give you an account of every bag that was stained, that is his duty, I suppose his books show.

Q. Your observation isn't very accurate is it? A. It is only from my own particular line of examining that ship.

By the Court:

Q. Did you observe it as they came out? A. My
2071 man told me it was badly damaged and I went down in the hold. I no need to have gone down. I am speaking of what I saw when I went down.

Q. It was just a superficial exterior view? A. An exterior view, that is all, in four or five minutes.

By Mr. Brown:

Q. How much cargo had been taken out at that time? A. I couldn't tell you the number of bags.
2072 Q. What was the level of the cargo in the hold? A. It was just the same height.

Q. The bags you were standing on were about the same level as the uppermost stringer-plate? A. No, down to the second stringer-plate.

Q. Was the second stringer-plate exposed to view? A. Yes. The upper stringer-plate there might have been a lot of sweat bags on for all I knew.

Q. Have you known cases of sweat extending

inboard for three tiers of bags? A. Yes, sir.

Q. In what cases? A. Lots of cases.

Q. Tell me one case? A. Well, coffee.

Q. I am talking about rice? A. That is bagged cargo, vegetable cargo the same as rice.

Q. Give me the name of the ship and state what cargo it was? A. I have handled thousands of cargoes.

Q. What is the name of the vessel? A. I can't 2074
tell you the vessel now.

Q. When did it occur? A. It occurred in the winter time or spring of the year.

Q. What year? A. Any year.

Q. No, I am asking for some specific instance. Can't you give us one? A. I will let you go down to some ship hold here and let you look at her—you seem to doubt it—I can't remember every ship I hav discharged.

2075

By the Court:

Q. Counsel wants to know if you can name the ship so that he can probably investigate the circumstances? A. Practically we have the discharge of all the China business that comes to New York—maybe forty or fifty vessels a year—and lots of them have rice; some turn out no damage, another will; I can't remember them.

Q. Whether it is reasonable or unreasonable that you should remember counsel wants to know 2076
if you do remember a ship where the cargo of rice was damaged inboard as far as that? A. I have seen several cargoes of rice damaged.

By Mr. Brown:

Q. Do you ever remember any cargo of rice in which the damage extended three tiers inboard from the side of the ship? A. I never examined every cargo that I have handled.

Q. Has there been such a case in your exper-

2077 Charles M. Tiffany.

ience so far as you know? A. As far as I know, yes. I have seen the whole floor of rice damaged.

Q. By sweat? A. I didn't say sweat.

Q. You knew very well it was not sweat? A. Of course I knew that wasn't sweat.

Q. Do you know of any case where the cargo of rice was damaged from sweat extending three tiers inboard from the side of the ship? A. I
2078 can't remember any ship's name.

Q. Has it ever happened? A. It certainly has.

Q. Has it happened in your experience? A. It has. I have had a large experience.

Q. When? A. Within the last five years.

Q. Once? A. Two or three times. These same people have had damaged rice, Jahn & Co.; I have discharged almost all their cargoes of rice and I have seen damage on several ships, they have had damaged rice.

2079 Q. I have asked as to where the damage extended inboard three tiers? A. I wouldn't say where the damage extended inboard three tiers, but what I am testifying to you is they have had cargoes here which have been damaged by sweat.

Q. You mistake my question, I am talking about damage from sweat that extends inboard three tiers—I want to know whether that has happened—please restrict your answers to that one question? A. I wouldn't testify to that.

2080 Q. So far as you know that has never happened except in the case of the *Folmina*? A. wouldn't testify it never has happened.

Q. I mean your observation? A. Under my observation, as I have testified before in regard to sweat, this ship might have been only two tiers in and might have been three.

Q. Isn't it true that so far as your observation of sweat damage in the case of a rice cargo is concerned the damage has extended further than the

tier adjacent to the sides or top of the ship? A. As a general rule.

Q. Isn't that always so far as your observation goes? A. Not necessarily, no, sir.

Q. I am asking whether this has ever happened in your observation? A. I testified to you before it has.

Q. But you afterwards withdrew that? A. But I cant name the ship. I have seen it. 2082

THE COURT: The tier that lies up against the ship, is that the one that sweats?

MR. BROWN: The usual place is on top under the deck beams. It may heat in the center but not sweat.

THE COURT: Your idea is that sweat occurs on the exterior tiers either at the side or top of the tiers.

MR. BROWN: At the uppermost tiers or side tiers, due to the condensation of moisture owing to cold on the outside of the ship. 2083

THE COURT: Doesn't heat itself produce sweat?

MR. BROWN: Certainly; because it liberates moisture that finds its way to the side of the ship and there it makes sweat.

THE COURT: Doesn't heat produce sweat in rice in the interior?

MR. BROWN: Never. It is only vapor of water it liberates and that may find its way to the exterior of the ship and there become sweat. 2084

THE COURT: When I was a boy I remember noticing that in a hay-mow and corn in stacks used to heat at the center. Grain sweats in a different way does it?

MR. BROWN: I dont think it is different.

2085 By The Court:

Q. You understand what Mr. Brown's idea is: His claim is that you can't go down to the center of the cargo of rice and find sweat, that the sweat must be on the exterior tiers? A. If the rice is green when it is loaded into a ship, your Honor, it will sweat the same as corn will. We have shipped thousands and thousands of bushels of
2086 corn to Africa and have had any amount of claims that had to be paid. The rule is to go ahead and put general cargo four feet from the side of the ship and put the bags of grain and flour so that it wont come in contact with the sweat of the ship and still we have it sweated—and Mr. Salter sitting there knows it.

By Mr. Brown:

2087 Q. Do you apply the word "sweat" to such cases as that? A. I certainly do; most certainly I do.

Q. Then we are talking about entirely different things. I don't use the word "sweat" in that sense at all, when I refer to that phenomenon I called it heat. A. Heat produces sweat.

Q. "Sweat" I call condensation of vapor of water against a cold object? A. No, sir, you are wrong.

2088 By The Court:

Q. Suppose we leave out the word "sweat" and use "wet." Does rice get wet in the center of the cargo? A. It certainly would.

Q. Suppose the water is in the vegetable itself and it heats would you have wet bags?

MR. BROWN: Of course if we had a moist article to deal with it will continue to be wet.

2086

Q. Can you tell me whether you have ever seen wet bags of rice down in the center of a cargo? A. I have seen bags with sweat stains on them in the center of a cargo.

Q. Call it "sweat" or whatever it is, you have seen bags that were discolored by moisture or dampness have you? A. Discolored from moisture or dampness.

Q. Have you? A. Yes, sir. 2090

Q. Have you ever seen any bags in such condition wet, themselves, the bags so wet that if you put your hands on them they would be wet or moist? A. Moist.

By Mr. Brown:

Q. You are speaking of rice now? A. I am speaking of rice now. We have to be so particular with it in ventilating, they have to build these big ventilators that go clear into the hold and others 2091 reaching from side to side of the ship, regular curbs, to give a current of air through the ship.

Q. I think you testified that in case of vessels carrying cargoes you never found sweat accumulating in the stringer-plates to make three or four inches of water in a ship? A. Not when they have cargo that could absorb it; take one loaded with molasses in casks and it would be hard to absorb moisture; bag cargo like jute, it would absorb it. 2092

Q. In case of sweat due to condensation of moisture against the sides of a ship you find it on one side as much as on the other, dont you? A. As a general rule you do.

Recess.

JAMES VAN VALKENBURGH, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. What is your occupation? A. Superintending and delivery of cargo.

Q. How long have you been engaged in that work? A. Thirty years.

2094 Q. With what class of cargoes have you principally to do? A. For the last fifteen or seventeen years it has been China cargoes exclusively.

Q. You were superintendent of the delivery of the cargo ex *Folmina* in May, 1901? A. Yes, sir, I was.

Q. How much of the time were you there yourself while the vessel was unloading? A. Continuously from 7 in the morning to 6 in the evening.

Q. Throughout the discharge? A. Throughout
2095 the discharge.

Q. Did the vessel discharge at an open dock? A. The vessel discharged at an open dock.

Q. There was no discharging at night I assume? A. None whatever, sir.

Q. What did the vessel have besides this rice that belonged to Jahn & Co? A. She had curios, wool, cassia, fire crackers and all various cargoes coming from the East.

Q. Did you mention tea? A. Tea also, yes, sir.

2096 Q. Do you remember the circumstance of the vessel being struck by a barge while she was unloading? A. Yes, sir; the vessel one night was struck by a float, a railroad float so it was explained to me, of course I didn't see the accident.

Q. Was there any damage to cargo resulting from that? A. None whatever.

Q. In any hold? A. In any hold.

Q. Do you recall what it was in the No. 3 lower hold or between decks, besides the rice coming to Jahn & Co, either one? A. I will swear to the between decks.

Q. I am only speaking of the No. 3 compartment between decks or lower hold? A. The after part of No. 3 between decks was stowed with rice, about 1200 bags of rice if I can recall; the forward part was curios, tierces of curios, that is constituted of various kind of material. 2097

Q. Was there a bulkhead between No. 3 and 4 between decks? A. Yes, sir.

Q. How far forward from that bulkhead did the rice that was stowed in the No. 3 between decks extend? A. How far? 2098

THE COURT: I don't understand that.

MR. KIRLIN: He says there was a bulkhead between 3 and 4 between decks and in the after part there was rice. I want to know how far forward.

Answer. If I interpret your question correctly you have reference to the distance from No. 3 between decks forward, do you not? 50 feet I should say. 2099

Q. Did that bring it up to the No. 3 hatchway? A. That brought it up to the No. 3 hatchway.

Q. What was stowed in the hatchway itself, in No. 3? A. Curios.

Q. The upper hatchway? A. The upper hatchway, that is the between decks hatchway.

Q. And did those curios extend down to the between decks hatch? A. Not below the between decks. 2100

Q. To the between decks? A. Yes, sir.

Q. Was the between decks hatch cover on? A. It was not.

Q. What was underneath the curios? A. Rice, bags of rice.

Q. What was the condition of those curios that were right in the square of the hatch? A. They were perfectly dry, in fine order.

Q. What was the condition of the rice that was underneath them in the lower hold? A. The con-

dition of the rice underneath the curios was perfectly dry.

Q. Was there any injury to any cargo in the No. 3 between decks on delivery?

THE COURT: Are you talking about curios and rice in the between decks?

MR. KIRLIN: Yes, your Honor.

THE COURT: I understand the after part of this deck was stowed with all bags of rice.

MR. KIRLIN: Up to the hatch.

THE COURT: And forward of the hatch were bags of rice on the deck.

MR. KIRLIN: No, curios.

THE COURT: And the rice in the lower hold.

MR. KIRLIN: I was speaking with special reference to the square of the hatch.

THE COURT: He says the curios were perfectly dry and the rice in the hold under the curios.

Q. Is that what you meant to say? A. I meant to say right directly under the curios the rice was perfectly dry.

Q. That rice you are speaking of was in the lower hold? A. In the lower hold.

Q. What was the condition of the rice in the between decks abaft the hatchway? A. Perfectly dry, in fine order.

Q. What was the condition of the other cargo that was in the between decks forward of the hatchway? A. Fine order.

Q. What was that? A. Curios.

Q. All curios? A. Yes.

Q. Now go to the lower hold. In the upper part of the lower hold underneath the between decks what was the condition? A. Good order, that is the term we use.

Y. How far down did you get before you came to damage? A. Six heights, six heights of bags.

Q. What did you find then? A. Then we found some slight damage on the port side.

Q. What was the nature of it—what was the appearance of the bags? A. The bags were slightly stained sort of a yellowish cast, yellowish stain.

2106

By the Court:

Q. What kind of bag is a rice bag? A. It is what we call burlap.

By Mr. Kirlin:

Q. To what extent was there damage at that point? A. We saw about 24 bags possibly during the afternoon.

Q. You are now speaking of the port side, are you? A. The port side, yes, sir. 2107

Q. What was the quality as to being damp or dry? A. It was dry apparently at that time as far as I could observe, it was not really wet, it might have been a slight dampness.

Q. You have had a great many of those cargoes in your experience? A. Yes, I have handled a great many.

Q. Did you form a judgment as to what the cause of the condition was you saw on the port side? A. I applied it to sweat at that time. 2108

Q. How far did you go down before you found any damage on the starboard side? A. After the next—at each time we would go in the hold we would take down six layers, that is considered the usual custom in cleaning out a hold, we go down directly six heights and work away from that—and on the next six heights, that was the 18th bag down, why then we struck a larger quantity of damage.

2109 James Van Valkenburger.

Q. On which side? A. On the port side. And we had a few on the starboard side also; and we continued, it appeared to be about what we would call amidships of the third hold, No. 3 hold, that is where the large amount of damage was; of course it extended forward-and-aft to a certain extent but it diminished as it went along, but it was centralized more in the center of the
2110 hold. What I mean by the center of the hold is on the ship's side, not in the center of the hold amidships.

Q. About what was the length of the damaged spot fore-and-aft? A. I should think it extended about 20 feet, 15 to 20 feet.

Q. How far inboard did it go? A. Right in one particular spot, in the center I should think if I recall it, extended about three or four bags.

Q. What was the condition about there? A.
2111 There were many bags there that were very badly —the bags appeared to be partially decayed.

By the Court:

Q. You went down, eighteen bags down, or heights down. Is that right? A. That is right.

Q. And you found a larger damage on the port side and some on the starboard side? A. Yes, sir.

Q. Now you begin to speak of finding something
2112 amidships of the third hatch. Are you still talking about the port side? A. About the port side, yes, sir, the same identical spot.

By Mr. Kirlin:

Q. Describe the condition of that damage? A. As I say, *here* is the center of the hold and *here* is the side of the ship, right in the center of course was the prime damage right there, and it extended, gradually slightly both forward and aft,

2113

the state of those bags just in that particular locality was very bad.

Q. What was the appearance of the bags? A. Some of them were even black; a portion of the bag, about half of the bags right in the center of the bag, appeared to be black and the rice of course was blackened somewhat itself, a portion of it decayed, it had been wet for a long season.

2114

By the Court:

Q. Was that right under the hatch? A. No, sir, that was right along the ship's side adjoining the ribs of the ship. The ships are protected with slats fastened all along so the cargo can't strike the iron.

Q. You are still on the port side, are you? A. I am still on the port side, yes, sir.

By Mr. Kirlin:

2115

Q. How far down did that extend? How many tiers were damaged? A. That extended right down to the skin of the vessel almost, with one or two exceptions.

Q. How was it at the very bottom? A. The bottom appeared to be dry.

Q. Tell us about the starboard side? A. That was very much the same with of course very much less damage, it appeared to be about the same causes and same locality.

2116

Q. Are you definite about the side, whether the heaviest damage was on the port or starboard side? A. The port side if I recall correctly.

Q. Which side of the deck was lying next to the dock? A. That was the port side I think. I may be a little—I dont study that to get terms very closely. I was on the north side, the ship was heading west and this was on the north side.

By the Court:

Q. Which was the worst damaged? A. On the north side.

Q. Then the worse damage was on the starboard side? A. Yes, sir.

Q. Then where you have been saying port side you should say starboard side? A. Say starboard side then.

By Mr. Kirlin:

Q. I asked you to describe the condition on the
2118 starboard side Substitute port for that and tell us what the damage was on the side next to the dock, the south side? A. I have been describing that side right along.

THE COURT: She lay the lower side to the pier, starboard up to the pier, heading west.

Q. Describe the condition on the port side, the south side? A. On the south side the conditions were very much the same only very much modified
2119 conditions, the bags were under the same conditions excepting they were few compared with the opposite side.

Q. Was there any difference in the kind of damage on the two sides? A. Not that I could observe.

Q. About how many bags altogether were damaged according to your idea? A. I should say if I recall correctly there were about 150 bags badly damaged and numerous bags slightly more or less
2120 stained.

Q. You say you have handled a good many rice cargoes before? A. Yes, sir.

Q. Or cargoes that contained rice. Have you had experience of similar damage before? A. Oh, yes, repeatedly.

Q. What was your opinion as to the cause of this damage? A. My opinion in regard to the damage was simply accumulation of sweat.

Q. Have you had such accumulation of sweat previously in your experience? A. Yes, sir.

Q. Can you recall cases of it? A. I remember in 1883 we had the steamship *Albany* which had some 50,000 bags of rice on at that time and I think we had 1,000 or more damaged from that ship in the same condition. 2121

Q. In the same general region as in this ship? A. Yes, the same condition.

Q. Have you had other cases of sweat damage similar to this you can recall? A. I had in 1885 as near as I can recall it the steamship *Port Adelaide* that also had a very large damage, she had some 30,000 bags if I can recall correctly. 2122

Q. Can you mention any others?

By the Court:

Q. 30,000 in all, or damaged? A. No, in all, that was her entire cargo of rice. Yes. The *Flintshire* also was a ship, I think she was in 1886 or 1887.

Q. The latter part of the 80's wasn't she, the *Flintshire*? A. Yes, sir. 2123

Q. There was a litigation about that, wasn't there? A. Yes, sir.

Q. Will you state your experience with regard to accumulations of sweat on stringer-plates in vessels—what you have seen of that? A. Stringers vary very much in various vessels, some are wide and some are narrow. The *Flintshire* if I recall they were some about two and a half feet, her stringers were, in width, and she was well dunnaged, about three or four inches of dunnage, and still there was a great water rolling in the stringers. This *Folmina* of course she had stringers but they were only about eight inches in width, she was well dunnaged with pieces of what we call cord wood which is sent out with oil from here and on return they use them for laying them in the stringers. 2124

2125 Q. In the trough you mean? A. I mean in the trough, yes, sir, what we call trough.

Q. The trough part of the stringer you mean the part that projects in the hold? A. Projects; there is a flange on the other side of the stringer and that enables water to accumulate there and be held. And on the ship's side it is all protected with bamboo poles about an inch and a half in dia-
2126 meter at the best running up and extending about eight or ten feet and tapering off about an inch, those are put about two or three inches apart; outside of those before the bags are put in there is a place for mats, where they keep mats, which is heavy coarse grass a mat is about half or quarter of an inch in thickness.

By the Court:

Q. On the side? A. On the side.

2127 Q. They lay outside of the bamboo? A. They lay outside of the bamboo and the bag is placed right against this mat. While there is heat generated from bags of course coming out of a warm climate to the Atlantic as soon as they strike that that heat of course generates sweat at once; the ship rolls and the accumulation of this sweat adheres to these mats and they keep continuously gathering this accumulation of dampness, which is right up against the bag, the bag absorbs it and gets a larger quantity than it can carry and it runs
2128 off the adjoining part. That is the way it extends inward from the ship's side.

By Mr. Kirlin:

Q. Is a rice cargo especially subsceptible to heat, liable to heat? A. Well yes, there is a great deal of heat.

Q. Is there any other cargo that comes here that you know of in which there are artificial systems of ventilation put in amongst the stowage as

2129

there is among rice? A. That is the only cargo I ever saw.

Q. And that is the universal practice in rice? A. That is the universal practice in rice.

Q. Was this ship provided with ventilators in the usual way? A. Yes, sir, every six heights had a ventilation system. There was two systems on the port and two on the starboard side of the hold.

2130

By Mr. Brown:

Q. Do you have an office on the dock? A. Yes, sir.

By the Court:

Q. I would like to ask you was there water in this trough in this stringer? A. No. Well, there was a very remote quantity, Sir, you could just see; I shouldn't say there was half an inch of water anywhere.

2131

Q. Was there half an inch? A. There might have been half an inch.

Q. What was the length of that puddle or pond, whatever you call it? A. That extended more in the center of the hold; I mean to say the hold is about 60 feet long and amidships would be about 30 and right about that center where the most damage was there appeared to be a little water, it didn't amount to a great deal.

2132

Q. Were the mats wet? A. The mats were wet, oh yes, you could wring the water right out of them.

Q. For what distance? A. I should say 20 or 25 feet, 15 to 20 feet.

Q. How with reference to the fore-and-aft extent of the hatch? A. You start off at the bulkhead forward at No. 3 and go along for 20 feet and be perfectly dry, then we would begin to strike

dampness and as we proceeded 15 feet farther we got wringing wet.

Q. You are talking about the *Folmina* on this occasion? A. Oh, yes, sir.

Q. That was about how much wet? A. About 20 or 25 feet, I didn't measure it.

Cross-Examined by counsel for libelants.

By Mr. Brown:

Q. On how many of the stringer-plates did you find the dunnage sopping wet as you have described?

Mr. Kirlin: He has not said anything about dunnage being sopping wet.

A. I will say about 20 feet, the distance of about 20 feet.

Q. What did you find sopping wet? A. Mats.

Q. There was cord wood in there too, wasn't there? A. Yes.

Q. That was wet also? A. I presume so, yes, sir.

Q. I ask on how many of the stringer-plates was that the case—one or more than one? A. It existed on both sides, port and starboard side.

Q. There were six stringer-plates in this hold, weren't there? A. I only saw two.

Q. One on the port side and one on the starboard side? A. Yes, sir.

Q. You don't know of there being any more? A. No, sir.

Q. You think there were some wet on each? A. Yes, sir.

Q. Wasn't the starboard side a great deal wetter than the port? A. Yes, sir; one side was very much wetter than the other.

Q. Wasn't the port side almost dry? A. I didn't examine that very minutely.

Q. The port side wasn't sopping wet, was it? A. There was dampness, yes, there was wet; some of the mats were wet on both sides of the vessel, both sides.

Q. Would you say on the port side the mats were a little damp whereas on the starboard side they were sopping wet? A. They were sopping 2138
wet, yes, on the starboard side.

Q. But not on the port side? A. They were not so wet, there wasn't so large a quantity of water apparently on the port side as there was on the starboard side.

Q. Was there any actual water standing in the gully or channel of the stringer plate on the port side? A. Very little I should say, I didn't examine very closely.

Q. Are you sure there was any? A. Oh yes, 2139
yes.

Q. You have testified there was some on the starboard side? A. Yes, and some on the port side as well.

Q. You think there was water standing on the port side? A. Oh, yes, yes.

Q. Didn't you examine the starboard side more carefully? A. I can't say I did; our attention was directed more particularly to that side than the other.

2140

Q. You testified you went down about six heights before you found any damage at all? A. Yes, that is correct.

And the first damage you found was trifling? A. Was trifling.

Q. And on the starboard side? A. And on the starboard side.

Q. What did that consist in—what kind of damage? A. Simply stain, the first few bags we got of damage were simply stained a sort of yellowish stain.

2141 Q. How many of them were there? A. I didn't count them; probably 15 or 20, something like that.

Q. But the uppermost tiers were entirely in good condition, nothing the matter with them at all? A. Entirely in good condition the first six heights.

Q. No stain of any kind? A. No, sir.

2142 Q. No dampness—they were prfectly dry? A. They were perfectly dry.

Q. After you found the 15 bags or thereabouts six heights below the top you found no more damaged bags until you got down eighteen heights. Is that right? A. The next layer—of course that would include twelve heights from the top to the bottom; we take six heights as we go along and discharge the vessel, those bags, I first take those all over, all off the square of the hatch and hold,

2143 then we start in again fresh and take six more as we go down.

By the Court:

Q. After you have reached that level? A. After we have reached that level we go down six more.

Q. Do you break out the whole hold all around before you commence to go down six more? A. We level off the first six, then break down six

2144 more and work forward and aft, four gangs.

By Mr. Brown:

Q. You take six heights off first, then run to the wings and take off all the bags to that level? A. Yes, sir.

Q. And break out the square of the hatch to the next six? A. Yes, sir.

Q. You had entirely finished the upper six heights without having any injury whatever? A. That is so.

Q. In your next stage, that is from six heights below to twelve below, you found 15 or 20 bags? A. Yes, sir.

Q. It was on the third stage you found the chief damage? A. It was on the third stage we found there more damage than on the second.

Q. Wasn't that the stage where you found the greatest amount, or was it still lower? A. It was in that or the next one. 2146

Q. So the chief damage was somewhere between twelve and twenty-four heights down? A. Twelve and eighteen; the chief damage was on the eighteenth tier, included.

Q. Would that be about the center of the damage, the worse spot of the damage? A. Yes; that would be about two-thirds down the depth of the hold.

Q. You say you only remember one stringer plate. Where would the spot of chief damage 2147 come with reference to that one stringer plate, if you remember? A. That stringer plate is I should say about 9 feet from the skin of the vessel.

Q. 9 feet above the ceiling? A. Yes.

Q. And this spot of worse damage would be about how far above the ceiling of the vessel? A. It extended a few feet above the stringer, I don't know just what distance.

Q. Was it about the same level as the stringer? A. It was above the stringer and just below the 2148 stringer.

Q. The spot of worse damage extended from a little above to a little below the stringer? A. Yes, sir.

Q. The center would be approximately the same height as the stringer then? A. Yes, sir.

Q. I understand you to testify that the damage there consisted in a black appearance and rotting of the bag. Is that right? A. Yes, a few of them.

Q. Was the rice caked and hard? A. No. Rice

doesn't cake, not under those conditions. Of course it might be laid in the sun and harden up, but rice breaks loose easily and does not cake.

Q. Didn't you find any bags that were caked? A. No, I didn't see any caked.

Q. Is it part of your duty to examine the damaged bags in the ship and find out what the cause of damage is? A. Yes and no. I am not sup-
2150 posed to.

Q. Tell us what you mean? A. Of course the cases of damage of any description I am usually required to go down in the hold and examine and usually take the chief officer with me, or captain or some of those, and try to determine the cause of the damage.

Q. Did you do that in this case—did you take the captain with you? A. I don't recall having the captain with me. The agent and myself went
2151 down.

Q. Do you mean Mr. Barber? A. No, sir; Mr. Truedell of McBride & Co., 92 Wall Street.

Q. But you don't remember any caked rice at all? A. No, sir.

Q. Were any of the bags broken open? A. There were a few bags which had decayed to such an extent they had to be replaced by other bags or patched.

Q. For how many heights did the damage ex-
2152 tend on the starboard side? A. The general part of the damage I think was about eight heights, as far as I can recall.

Q. And about four bags inward from the skin? A. Right in the amidships center, I mean along the ship's side, extending in about four, just in the center of the hold.

Q. And forward and abaft that a little less? A. Yes, it graduated off and ran off into—

Q. Did it extend as far inboard throughout these entire eight heights where you say the dam-

age occurred, or graduate off upward and downward? A. I didn't examine it very carefully, I didn't remain down there possibly more than 10 or 15 minutes any one time. I made surveys twice a day down there and they continued discharging.

Q. The damage on the port side was comparatively trifling? A. Very much lighter, yes, sir.

Q. To what elevation did that damage occur? A. About the same elevation. 2154

Q. Did that affect only the bags next the skin of the ship? A. The side of the ship you mean?

Q. Yes, the side plating of the ship? A. Yes, it only affected the bags that were on the side of the ship.

Q. It didn't extend inboard to the second or third tier? A. I didn't observe that it extended inboard.

Q. Did it affect only the side of those bags that were next to the skin of the ship? A. As far as 2155 I could observe.

Q. How was it as to the damage on the starboard side—did that extend around the bag? A. That extended in at one point two or three bags.

Q. Taking the particular bag itself it affected more than one side of each bag didn't it? A. No; sometimes a bag would be simply stained very slightly on this end but diagonally on the other end it had taken in about half of the bag.

Q. Were not the bags on the starboard side 2156 still wet? A. I didn't feel of them, to tell the truth, whether they were wet or not.

Q. You don't know? A. No. Of course they didn't look wet, the appearance wasn't of being wet, they might have been damp.

Q. You wouldn't know whether they were caked or not, would you? A. No, sir.

Q. Because you didn't feel them? A. Because I didn't feel them, but I saw them handled by the longshoremen and saw them going out on the

2157 lighter and saw them handled there and of course there wasn't any indication they were caked.

Q. As to the damage on the port side could you tell whether those bags were wet or dry? A. Were wet or dry? They had the appearance of being slightly damp, that is all.

Q. Those you didn't feel any more than the others? A. No, I didn't feel them.

2158 Q. How many of the bags on the port side were damaged? A. I should say there were possibly 25 bags there that were damaged quite bad and there were possibly 50 more that were stained.

Q. But the worst of them were not damaged so bad as those on the starboard side, were they? A. No, they were not.

Q. The bags on the port side didn't present that black appearance, did they? A. I don't re-

2159 call seeing anything that looked black.

Q. Except when you were called on board a steamer to make a special examination where there is known to be damage you dont go on board much, do you? A. Oh yes, I go on board every half an hour.

Q. Dont your duties begin when the cargo is discharged from the ship and put on the dock? A. No; I have full charge of the stevedore and everythng on the ship, directing him where to

2160 work and when to work, when to start and when to knock off, the whole thing is placed in my care and charge.

Q. You have mentioned three cases of serious damage to rice which I think you attributed to sweat? A. Yes.

Q. The *Albany*, *Port Adelaide* and *Flintshire*. A. Yes, sir.

Q. Take the first, the case of the *Albany*. Did the damage extend inboard more than one tier from the skin? A. I don't recall, Idon't recall. I

recall that it was in No. 2 hatch principally on that occasion.

Q. How was it in the other two instances? Did the damage extend inboard to the second, third or fourth tier or only on the outer tier? A. On the outer tier principally I think. Although I do remember a little circumstance that it did extend in some places to the second or third bag, but there was a great quantity of it. 2162

Q. In what instance do you think it extended to the second or third bag? A. On the *Albany* in the No. 2 hatch.

Q. You have had considerable experience in sweat? A. Oh, yes, sir.

Q. Isn't it the rule that sweat shows itself under the deckbeams in the upper most tier? A. Well yes, under conditions; it depends altogether on the deck.

Q. Isn't that the favorite place for sweat to 2163 show itself? A. Yes.

Q. You testified I think that the cargo in the between-decks came out perfectly sound and uninjured? A. That is right.

Q. How high was the rice in the between-decks piled? A. Ten high I should say.

Q. Did it reach up to the main deck? A. It reached up to the upper deck.

Q. That you call the main deck, dont you? A. No, that we call the spar deck. 2164

Q. That is the weather deck, isn't it? A. The weather deck.

Q. The deck above the between-decks is the weather deck, isn't it? A. The main deck is what we call between-decks.

Q. You call that deck above the between-decks the spar deck? A. Yes, the upper deck.

Q. The rice in the between decks extended to the spar deck? A. Yes.

Q. And the upper tier of the rice was entirely unaffected by sweat? A. Yes, sir.

Q. And the upper tier in the lower hold was entirely unaffected by sweat? A. Yes, sir.

Q. In the three cases you have mentioned the damage was on both sids of the ship, wasn't it? A. Yes, on both sides of the ship.

Q. Isn't it the rule that sweat damage will at-
2166 tack one side of the ship as much as the other? A. You cant account for those things.

Q. But that is the rule, isn't it, that is the regular thing? A. Yes, it is about equally divided I should say, I never observed any particular—

Q. Isn't the case of the *Folmina* the only case you ever heard of where there seemed to be considerable disparity in the damage which you attribute to sweat? A. It seems a little that way, although of course other cases we have not observ-
2167 ed, haven't looked at it very closely, as far as I have observed it is, it seems to be little more on one side than on the other.

Q. There was a striking disparity of damage, wasn't there? A. Yes; there was quite a percentage more on one side than on the other.

Q. Isn't that the only case you attribute to sweat where there is a striking disparity between the two sides? A. No; I have seen it all on one side and nothing on the other; not with rice but
2168 I will say with other cargo.

By Mr. Kirlin:

Q. Was there any possible way, as far as you could see, for the damage to have been caused in the vessel by sea water? A. There was not.

 2169

CHARLES MCCARROLL, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. What is your business? A. Foreman stevedore.

Q. By whom were you employed in May, 1901? The Atlantic Stevedoring Company.

Q. Were you at work on the *Folmina?* A. 2170
Yes, sir.

Q. What was your position on the vessel? What part of the vessel did you have charge of? A. I had charge all over, charge of the ship.

Q. You were foreman of the ship, were you? A. I was foreman of the ship.

Q. Do you remember the rice that came to Jahn & Co. on that voyage? A. Yes, sir, out of No. 3 hatch.

Q. Did you yourself overlook the discharge of 2171
that cargo? A. Yes, sir.

Q. From both the between-decks and lower hold? A. Yes, sir.

Q. Describe how the cargo came out of the between decks of No. 3? A. It came out in pretty good order. We only had the after end of No. 3 between decks with rice in, had general cargo forward and it turned out in pretty good order.

Q. What was the condition of the rice? A. The rice in very good order, good order. 2172

Q. Tell what the condition of the cargo was in the lower hold as you worked down? A. It turned out very well on the after end of the hatch up to about the third section, or second section of the hatch; the forward part, one section of the hatch, that would give you about 8 feet, 8 feet forward of that was about all damaged, the rice in the wings and on top.

Q. There are three sections in the hatch? A.

Yes, sir. The hatch is 24 feet long. Two sections turned out very well, one section forward where the damaged rice was in the wing.

By the Court:

Q. Which wing? A. In the starboard wing mostly.

By Mr. Kirlin:

Q. How far did you go in the lower hold before you came to any damage? A. Got down to the first stringer, that would be about 7 feet.

Q. Tell what you found when you got down to that level? A. We had some bags on top that was damaged before we got down, the first top tier. She had a list to starboard when she came in.

Q. And some of the top tier bags on the starboard side— A. On the starboard side and port side too were damaged.

Q. What was the character of that damage? A. Sweat.

Q. Were those the bags next underneath the deck? A. Yes, sir.

Q. After you took those off what was the condition of the next tier? A. The next tier was in very good order.

Q. How far down did you go before you got to any more damage? A. About 7 feet.

Q. Describe what the condition was there on both sides? A. She had a list to starboard and all the sweat that run from the deck naturally would go down the starboard side and it struck the mats, and then I should think the rice absorbs moisture so it will stain more than one bag inboard.

Q. How extensive damage did you find taking the starboard side where there was most damage? A. I think about two or three bags.

Q. Inboard? A. Yes.

Q. How far fore-and-aft in the hold, what length? A. About 18 feet I should judge.

Q. Now deep down? A. Two stringers, that would be about 14 feet down.

Q. What was the condition in the very bottom? A. Dry.

Q. What was the condition around the shaft tunnel? A. Perfectly good order, good order.

By the Court:

Q. You found this bad condition for 14 feet after you got to it. Is this right? A. No; where we struck the most damaged cargo was about 7 feet down.

Q. How far down did it extend from that? A. 14 feet, two stringers, the hatch is about 24 feet deep.

Q. It extended so you would be 21 feet down in all or 14 feet down in all? A. 21 feet down. Excuse me, it couldn't be that—24 feet hold; it would be two stringers down where the damaged cargo was, it would be 14 feet where the damaged cargo was from the top of the hold down; from the second stringer down that would leave 21 feet.

Q. You went down 7 feet after finding this on top before you found damaged bags? A. Yes, sir.

Q. How far down do you say they extended bad? A. From the second and third stringer, that is 7 feet.

By Mr. Kirlin:

Q. Down to the third stringer? A. Yes, sir, 7 feet.

Q. That is from the top stringer down to the lower of the three stringers this damage extended along the side? A. Yes, sir.

Q. You didn't measure that exact distance I suppose? A. I have been working on ships so long

I know what the distance between stringers is. Two stringers would be 7 feet.

By the Court:

Q. How far down after you get in the hold is the first stringer? A. About 7 feet.

Q. That is where it began? A. And underneath that is another stringer, that is 7 feet more.

2182 Q. Did it go below that stringer? The next is how far down? A. She only had two stringers in her.

Q. How much below the second stringer did it extend? A. The damaged cargo? Right underneath the second stringer.

Q. That would be 7 feet then? A. Yes, sir.

By Mr. Kirlin:

Q. What was the condition on the opposite side,

2183 port side? A. The port side was damaged on top; all were sweated on top, just a few bags, not very many, and the wings were sweated too.

Q. How about the stringers on that side? A. They were in perfectly good order.

Q. Have you worked on China cargoes very much? A. Yes.

Q. For how long? A. For the last twelve years.

Q. Have you had rice during that time? A. Yes, sir.

2184 Q. Do you know how it is stowed? A. I know how it is stowed.

Q. Did this ship have permanent cargo-battens on the side? A. She had bamboos, cross bamboos.

Q. Before you come to the bamboos. Battens fore-and-aft on the beams? A. Battens fore-and aft on the beams or ribs.

Q. Bamboos across on that? A. Yes, sir.

Q. And then mats? A. Yes.

Q. How were the stringer plates dunnaged? A. There were bamboos—what we call dunnage wood,

and bamboos on top of that; I suppose about four inches dunnage.

Q. Did that keep the cargo off the beam? A. Yes.

Q. And is that the usual way cargo is dunnaged for stowage on those beams? A. About all the time, yes, sir.

Q. What is your judgment as to the cause of the condition you found in the wings? A. I should judge it was, by the ship having a list the way she did to the starboard, all the sweat that accumulated down in that hold naturally run to the starboard side.

Q. Was it your opinion that it was sweat damage? A. Yes.

Q. Was there in your opinion any way in which that could have been caused by sea water? A. No, sir, without some of the plates had been leaking.

Q. Had any of the plates been leaking as far as you could see?

Objected to.

A. No, sir.

Q. What was the condition of the mats and the dunnage there? A. They looked kind of mouldy and damp just the same as sweat would give, they were not wet, what you call wet, but damp.

Q. Did you see any water standing in any of the stringer plates? A. Naturally it would if the sweat run down.

By the Court:

Q. You did, did you? A. There was kind of dampness underneath on the stringers, no water.

By Mr. Kirlin:

Q. Have you known, with your previous ex-

2189 perience with these China cargoes, from similar condition of matting and sweat? A. Yes, sir.

Q. Is there any difference in the side of the ship that has evidence of sweat on the China cargo, as far as you noticed? A. I should think striking the Atlantic coast the northern side would accumulate more sweat than the port side.

2190 Counsel for libellants moves to strike out the answer as not responsive.

Motion granted.

THE COURT: He may state what his observations have been.

Q. Have you observed whether there is any more evidence of sweat on one side than on the other on China ships? A. Yes, sir.

Q. Which side? A. Mostly always on the starboard side.

2191 Q. Is there any reason you can assign for that? A. Yes; striking in the cold weather, cold air will strike through and condense water more than what it will in hot air.

Counsel for libellant objects that the witness is not competent.

Q. Have you been to sea? A. Yes, sir.

Q. How many years? A. About fifteen years.

2192 CROSS-EXAMINED by Counsel for Libelants:

By Mr. Brown:

Q. When you were at sea were you an ordinary seaman? A. Yes, sir; from ordinary seaman up.

Q. Up to what? A. Up to chief officer.

Q. Of what? What kind of boat? A. Sailing ships.

Q. How large? A. Extending up to 800 tons.

Q. Of course you were around in all the holds

one as much as the other? A. On what—on the *Folmina?* Yes sir.

Q. Your chief desire was to get the cargo out? A. Yes, sir. and put it out in perfect order.

Q. It is not part of your duty to determine the cause of any damage, is it? A. I report to the mate, always report to the mate if I see any damage.

Q. It is not part of your duty to observe facts 2194
that will show the cause of the damage, is it? A. The cause of damage?

Q. Is it any part of your duty to observe facts which will indicate the cause of damage? A. Certainly, if I notify the mate I will find out what the cause was.

Q. You say if you notify the mate you will find out the cause? A. Yes, sir.

Q. When did you first notify the mate there was any damage on the *Folmina?* A. I think it was 2195
about the third day, or second day we were working.

Q. How much cargo had been discharged at that time? A. The between-decks was discharged.

Q. How much of the lower hold No. 3? A. We were first breaking down I suppose six or eight bags.

Q. Did the mate see the top tier? A. Yes.

Q. Where was the top tier of bags at the time you reported to the mate there was damage? Was it on the dock? A. No,, sir, it was on lighters, it 2196
was put on lighters.

Q. So the mate didn't see that top tier? A. I dont think he did. For the sweat that was on, we mostly always take notice of the sweat that is there, we aint very practical about it.

Q. The damage, if any, in that top tier was a mere trifle, wasn't it? A. It was all sweat, what we call sweat.

Q. How did you know there was any damage in the top tier? A. The bags were damp.

Q. They seemed a little damp? A. They were damp.

Q. They were not stained, were they? A. They were sweat. Sweat will stain a bag.

Q. I am asking whether those bags were stained. They were stained, yes, sir.

Q. You observed no more damage until you got down to the stringer-plate? A. The first breaking
2198 down we got in towards the wing.

Q. There you found a good many pretty badly damaged bags on the starboard side? A. Just about two and on the port side we found some too.

Q. The damage on the portside you refer to was in the top tier, wasn't it? A. Yes, and down on the side some few bags.

Q. But in the vicinity of the stringer-plates on the port side the bags were in perfect order? A. Yes.

2199 Q. There was no analagous or similar damage on the port side to that which you found on the starboard side, was there? A. No, sir.

Q. What condition of the bags on the starboard side in the vicinity of the stringer-plate? A. They were damp.

Q. They were wet, weren't they? A. Not what I would call wet.

Q. Were they caked and hard? A. I couldn't say whether they were caked and hard, I didn't handle them, but what I observed in them they
2200 were not caked; rice I should think naturally would swell.

Q. We dont want what you naturally think but what you saw? A. I saw they were damaged.

Q. Were they black in color? They were kind of grayish color, dark gray.

Q. Not black? A. No, sir.

Q. Did you open any of the bags? A. No, sir, I didn't open any of the bags.

Q. How many tiers inboard did the damage extend? A. About two.

2201

Q. Three? A. It might be more than two, but about two.

Q. You noticed it extended two and are not sure whether it extended any further? A. No, I do not know whether it extended any further.

Q. But you noticed it did extend two inboard? A. Two or three, yes, sir.

Q. Do you swear positively there was no water standing in any of the stringer-plates? A. I said 2202
there was dampness there.

Q. Was there any water standing there? A. I think you could see water, what I would call sweat where it run down.

Q. Did you see water standing in any of the stringer-plates? A. Water? It was dampness there but I couldn't say it was water there.

Q. Then I understand you to testify there was no water standing in any stringer-plate. Is that correct? A. Yes, sir. 2203

Q. In which stringer-plate did you see this damp appearance? A. Just about 8 feet forward of the hatch, and 8 feet aft of the hatch.

Q. In the two stringer-plates on the starboard side, or only one? A. In the two stringer-plates on the starboard side, the first and second.

Q. The stringer-plates on the port side were dry? A. I couldn't swear they were exactly dry but it was well dunnaged.

Q. You call this moisture and dampness that 2204
you saw sweat. Have you any reason for calling it so? A. Yes, sir.

Q. State your reason? A. That I could see it on deck, on the between-decks.

Q. Can you tell the difference between sea water damage and sweat damage from examination of the bags? A. I could not.

By the Court:

Q. Wherabouts on deck did you see it? What do you mean by that? A. The sweat?

2205 Charles McCarroll.

Q. Yes? A. In the two sections about 16 or 18 feet in the forward part of the hatch.

Q. On the deck? A. On the between decks, yes sir; underneath the between decks.

By Mr. Brown:

Q. You mean you saw some bits of moisture standing on the under side of the between decks?

2206 A. Yes, sir.

Q. And that is your reason for supposing all the damage below that was sweat damage? A. The reason why was she had a list to starboard.

Q. Because she had a list to starboard and because you saw the bits of moisture under the between decks you call all the damage sweat damage? Is that right? A. Yes, sir.

Q. You have no other reason to give than that, have you? A. I say it was sweat that run

2207 down there.

Q. Your reason for thinking so is what I have just stated and nothing else. Is that true? A. Yes, sir.

Q. Did some of these bags taken from the starboard side fall apart on being handled? A. Not to my knowledge.

Q. Do you recollect distinctly about that? A. Yes, sir, not to my knowledge; I wasn't there at the time being.

2208 Q. Do you remember Capt. Salter at my left? A. Yes, sir.

Q. Do you know him by sight? A. Yes, sir.

Q. Do you remember having a conversation with him on board the *Folmina*? A. No, sir. I speak to him about every time he comes aboard the ship.

Q. Don't you remember calling his attention to the fact the bags dropped apart on being handled? A. No, sir, I do not.

2209

Q. Will you swear you did not? A. No, I will not swear I did not but I don't remember.

Q. Do you swear positively no such thing happened?

THE COURT: He says he don't remember.

A. I do not remember.

2210

Q. Are you willing to swear positively no bags did as matter of fact drop apart being handled? A. Not to my knowledge, I wasn't there at the time being, there might be a bag or so come in the draft when I wasn't there, I have to be all over the ship.

Q. Did you find any sweat in the between decks rice? A. No, sir.

RE-DIRECT by Counsel for Claimants:

2211

By Mr. Kirlin:

Q. Have you, in your experience, seen the effect of sweat on a bag cargo a great many times? A. Yes, sir, in coffee especially, coffee and rice.

Q. Judging from the appearance of the damaged condition of the bags could you form any opinion as to what caused it? A. Sweat will turn a bag kind of a dark gray. I think salt water will turn it black.

2212

Q. Was the appearance of these bags such as you have seen in your experience from sweat? A. From sweat, yes, sir.

Q. Have you in your experience with China cargoes found damage right in the heart of cargoes? A. On the top tiers, sweat.

Q. Haven't you had it in the heart of cargoes with tapioca, flour, pepper and things of that kind?

Objected to as leading.

2213 C. A. Johnson.

A. Yes, sir.

By Mr. Brown:

Q. Have you had any experience in sea water damage in case of rice? A. No, sir.

2214 C. A. JOHNSON, being duly sworn and examined as a witness for the claimants, testifies:

By Mr. Kirlin:

Q. How long have you been a stevedore? A. I have worked stevedoring twelve or thirteen years.

Q. What was your work before that? A. Seafaring.

Q. How many years did you go to sea? A. About fourteen years.

2215 Q. Were you working for the Atlantic Stevedoring Company in May, 1901, when the *Folmina* came here? A. Yes, sir.

Q. In what capacity? A. Second foreman.

Q. Were you under McCarroll? A. Yes, sir.

Q. What part of the ship did you have immediate charge of? A. The after part of the ship.

Q. Did that include No. 3 hold? A. No. 3 hold and No. 4.

Q. Did you supervise yourself the unloading of

2216 the cargo from No. 3 hold? A. Yes, sir.

Q. Do you remember the rice that came for Jahn & Co.? A. Yes, sir. I know rice was in the ship, I don't know who it was consigned to.

Q. How much rice was there? A. I couldn't tell exactly to the bag.

Q. Was the whole lower hold full? A. The whole lower hold was full and the after part of the No. 3 between-decks.

Q. Were you there during the entire discharging, yourself? A. Not exactly all the time but I was there the biggest part of the time.

C. A. Johnson.

2217

Q. Were you on the ship all the time? A. Yes, sir.

Q. Every day? A. Yes, sir.

Q. But not in No. 3 all the time. Were you there enough of the time to be able to state what the condition of the cargo was that came out of No. 3 between-decks? A. Yes, sir.

Q. In what condition was it? A. In good condition.

2218

Q. What was the condition underneath the between-decks in the lower hold? A. The cargo in the lower hold when we opened up the hatches just around the coamings were sweated, and the top tier in the lower hold was damaged by sweat.

Q. What was the indication of that on the bags? What did the bags look like in the top tier? A. Kind of mouldy or damp.

Q. What was the condition of the next tier below that ? A. In good order.

2219

Q. How far down did you go before you came to any that was not in good order? A. We broke down six or seven heights of bags and then what we call the skin of the ship right off level; when we come to the ship's side I found a bag there I thought was kind of damaged—on both sides of the ship.

Q. In the first six or seven tiers? A. Yes; but after the second break down I found them continually between the first and third stringer.

2220

Q. You broke down six or seven bags each time, did you, A. Yes, sir.

Q. Worked it right off level all over the hold? A. Yes, sir.

Q. And broke off another six or seven bags and worked that down level? A. Yes.

Q. When you first broke in the wings on both sides you found an occasional bag damaged? A. Yes, sir.

2221 C. A. Johnson.

Q. How was it damaged? A. I can't account for it any other way than sweat.

Q. What was the character of the damage? A. kind of damp and kind of mouldy-looking.

Q. In the second and third breaks did you find any more damage? A. Yes.

Q. Describe what the character of the bags was in the second and third breaks. A. Some was
2222 dark, kind of darkish gray, others was blue mouldy.

Q. How many breaks as you call them did you make before you got to the bottom stringer, do you know? A. I ain't perfectly sure but I think we made two breakdowns and then broke right down to the bottom all but one bag.

Q. Which side was there the most damage on, if there was any difference between them? A. The starboard side was the most damaged, but
2223 there was plenty of damage on the port side also.

Q. Whereabouts with reference to the hatch was this damage on the starboard side—forward of the hatch, abaft it or opposite it? A. It was a little forward part of the hatch; about 16 feet in the square of the hatch starting from forward and going aft.

Q. At what place was the damage that you found on the other side with reference to the hatchway? A. About the same way.

2224 Q. About opposite the hatch? A. About opposite the hatch on the port side.

Q. What do you say the length of the damage was fore-and-aft on the starboard side? A. There were as near as I can remember—the hatch is 24 feet long and divided into three sections, each section 8 feet long, and the two sections there may be a couple feet behind the second section that it was damaged.

Q. Was there any difference in the appearance

of the bags or in the kind of damage on the two sides? A. Not that I can remember.

Q. How many cargoes of rice have you worked on before this? A. I don't think I worked on more than two ships previous to the *Folmina* with rice, but I have been on board a ship with a full cargo of rice.

Q. You have carried a cargo of rice when you were at sea? A. Yes, sir.

Q. Tell us about that cargo you carried—where from and to? A. From Ringat to London.

Q. In what kind of ship? A. The same kind, iron sailing ship.

Q. How large a ship? A. 2088 tons register she was.

Q. Was there any damage in that cargo? A. Yes, sir.

Q. What caused it? A. I cant tell you any more than sweat, the only thing I know of.

Q. How extensive was the damage? A. Right fore-and-aft along the ship's side.

Q. Was it the same kind of damage you had on the *Folmina*? A. To the best of my recollection, yes.

Q. Did the bags look the same to you? A. The bags looked the same to me.

Q. What was the condition of the dunnage of the *Folmina*? A. What do you mean?

Q. The mats, describe how they were? A. They looked kind of damp and soiled like.

Q. Did you see the dunnage on the different stringer-plates? A. Yes, sir.

Q. Have you seen cargoes stowed on the stringer-plates in these China and Japan ships? A. Yes, sir, mostly every day I see them.

Q. State whether this was the usual kind of dunnage on the stringer-plates? A. Yes, sir, it was the usual kind of dunnage.

2229 Q. Was it sufficient to keep the bags off the plates? A. Oh yes, sir, there was four or five inches clear of the plates.

Q. What was the condition of the cargo in the very bottom of the ship? A. The condition of the cargo in the ship was first class, fine.

Q. Was it wet or dry in the very bottom? A. It was dry, perfectly dry.

2230 Q. Was there any other way in which you could account for the damage, in your own judgment, except in the way you have accounted for it? A. No, sir.

Q. Was it possible for that damage to have been caused by sea water as you judge? A. I should hardly think so.

Q. Can you suggest any way sea water might have got there? A. Not without a plate should be opened up.

2231 Q. Did you see any evidence of that? A. No, sir.

Q. How far inboard did the damage extend, how far into the cargo? A. Two bags right along the stringer and some places three.

Q. In this cargo that you had carried from Ringat which you have spoken of which was damaged by sweat, do you recollect how far the damage extended in? A. I couldn't really tell you it was so long ago, I couldn't tell how many bags

2232 inside. I know it was in pretty bad condition when it reached London after 180 days passage from Ringat.

Cross-Examined by Counsel for Libellants:

By Mr. Brown:

Q. What was your position on the vessel that carried the cargo of rice from Ringat? A. I was acting as boatswain and third officer.

Q. So far as you remember the damage didn't

2233

extend further than to the bag adjacent to the side of the ship? A. I couldn't really tell you how far the damage extended inboard.

Q. I think you said you had two previous damages to rice cargoes previous to this? A. Two previous to this.

Q. Was there damage to them? A. Yes, sir.

Q. Where? A. On top on the upper tier and on the stringer.

2234

Q. Only the bags adjacent to the stringer? A. Only the bags adjacent to the stringer, yes, sir; may be another inside too, I didn't take no particular notice to that.

Q. The bags that you found in the between-decks were not affected at all by sweat or dampness or injury of any kind? A. Not that I am aware of.

Q. I mean on the *Folmina*? A. Not that I am aware of. They looked to me to be in good condition.

2235

Q. When you came to the lower hold you say the upper tier was somewhat moist? A. Yes, sir.

Q. Was it discolored at all? A. Kind of mouldy and damp and moist looking; I couldn't state exactly the color of it.

Q. Did that extend to the port wing? A. Port and starboard wings, both of them.

Q. You have referred to some damage on the port side. A. Yes.

2236

Q. Do you mean the damage to the upper tier on the port side? A. To the upper tier on the port side also and on the starboard side upper tier also.

Q. Was there any other damage on the port side than that? A. Yes.

Q. Where? A. Along the stringer, the same way as on the starboard side.

Q. Which stringer? A. I aint very sure of

2237 that but I think it was the second stringer there too.

Q. Were you in that hold when they were taking out the damaged rice from the port side? A. Yes, sir.

Q. Dont you think you can be mistaken about there being any damaged rice on the port side? A. It couldn't be possible I could.

2238 Q. Mr. McCarroll was in that hold while they were taking out that cargo also, wasn't he? A. He was there occasionally, yes, once in a while but he wasn't there as regular as I was; I had only part of two hatches to take care of and he had the whole ship to take care of.

Q. Did you report to Mr. McCarroll the damage you found? A. It is not ncessary to report every little thing that we find he generally goes to the officer. If we strike the head foreman

2239 of the ship I report to him. or the officer first I report to him.

Q. Did you report to anybody the damage you found on the port side? A. I spoke to Mr. McCarroll about it and to all the officers of the ship and if I ain't mistaken to our superintendent.

Q. Mr. Van Valkenburgh? A. Him, and our superintendent Mr. Tiffany.

Q. You are positive you spoke to Mr. McCarroll about it, are you? A. Pretty near positive,

2240 yes, sir.

Q. Wasn't the damage on the port side trifling in character and extent? A. I don't understand that.

Q. It was a very small matter on the port side, wasn't it? A. It wasn't so big a matter as it was on the starboard side.

Q. Wasn't it ten times as much on the starboard side? A. I didn't count the bags.

Q. Don't you think it may have been about ten

times as much on the starboard side? A. I didn't count no bags. I couldn't tell you that.

Q. It might be something like that, might it not? A. I couldn't give you no answer to that effect whatsoever.,

Q. Are you sure there were more than one or two bags that showed damage on the port side? A. Oh, I am perfectly sure of that but the number of bags I can't tell you. 2242

Q. Were there as many as four or five? A. I am perfectly sure there was four or five and I know there was over twenty at the very least.

Q. How many were there on the starboard side? A. I can't tell you, I didn't count them.

Q. Too many to count, weren't there? A. Maybe.

Q. These damaged bags on the port side were next to the skin of the ship, weren't they? A. No, sir. 2243

Q. Where were they? A. On the stringers.

Q. Next to the stringers, weren't they? A. Yes, sir.

Q. The tier that touched the stringers? A. Yes, sir.

Q. On the starboard side they extended inboard three or four tiers from the ones that touched the stringers, didn't they? A. No, sir; they extended in two tiers and some parts three.

Q. Two or three instead of four. You have tes 2244
tified you can't account for this damage except by supposing it to be sweat. Do you mean by that you saw no other explanation, no hole or aperture where sea water could get in? A. That is what I mean. Another thing, in between decks where I broke down I could take my finger along the top part of the deck and the drops would fall off it.

Q. You saw drops or beads there? A. Yes,

sir. In the lower hold underneath the between decks.

Q. The reason you think that was sweat is because you saw the beads under the between decks and saw no hole for water to get in? A. That is right.

Q. There was no other reason for the sweat, was there? A. I can't give any.

2246 Q. Don't you rmember the appearance of the bags that came from the starboard side and those from the port side were quite different, I mean the damaged bags? A. I can't remember there was any difference in the appearance if any.

Q. Will you swear positively whether they were the same in appearance or different in appear ance? A. I can't swear one way or the other.

Q. You were not paying much attention to it?

2247 A. I was paying all the attention that belongs to my part of the business. It is not my business to see what the color of the bags is. my business is to rush the cargo out.

Q. It is not your business to see how they look? A. No, sir.

Q. Therefore you made no careful examination of the character of the damage? A. No, sir.

Q. You were trying to get it out as soon as you could? A. Exactly; the sooner the better.

2248 Q. You say you found sweat around the coamings. Do you mean on taking the hatches off? A. Not on the coamings, but on the bags underneath the coamings.

Q. Were the hatches on the between decks? A. The hatches were on the between decks, yes, sir, beams and fore-and-afters.

Q. Did you go aboard the ship when the hatches were taken off? A. Why certainly, yes, sir.

Q. Did you take them off? A. I didn't take

them off but I superintended the job of taking them off. 2249

Q. Who was present at the time? A. The four men in the hold and Mr. McCarroll.

Q. Is that all? A. To the best of my recollection; there may be more around.

Q. Were the officers of the ship there? A. That is hard for me to tell; they may be on the upper deck when I was on the between-decks.

Q. Was the port warden there? A. I wouldn't know the gentleman if I see him. 2250

Q. Can't you tell whether there was a man from shore that might be port warden? A. No. How could I? There was so many men coming there; I wouldn't know the port warden if I see him.

RE-DIRECT by Counsel for Claimants:

By Mr. Kirlin:

Q. Did you see the condition of the stringer plates themselves after you got the cargo out? 2251
A. Yes, sir.

Q. Describe what the appearance of the stringers was. A. They were nothing unusual to me more than simply kind of damp you know, like kind of rusty—more so I think—it was paint than anything else.

Q. You said there was dunnage in them? A. Yes, sir.

Q. Did you see any water in them? A. No, sir.

Q. See any standing water on any of the stringers? A. Not a drop to my knowledge. 2252

RE-CROSS by Counsel for Libellants:

By Mr. Brown:

Q. Did you say you thought the stringer plates looked as though they were painted? A. I say they were painted and it looks more also like wet paint than anything else. Paint naturally will dissolve after water gets on it or sweat whatever it may be.

2253 C. A. Johnson.

Q. What was the condition of the dunnage on the stringer plates? A. Perfectly dry, except the wood where it struck the iron.

Q. How about mats, were they dry? A. No, they may have been wet, that is to say, damp.

Q. Were you paying particular attention to the stringer plates at all? A. What do you mean?

Q. Did you notice what their condition was?
2254 A. Only I had to clean them out that is all, clear them out like.

Q. The damp appearance was on the starboard side, wasn't it? A. Both sides.

Q. On the starboard was dry? A. I say on both sides.

By Mr. Kirlin:

Q. Did you clear them out? A. I didn't clear them out not personally, just chucked a match
2255 down, but piled the dunnage up again according as it is taken off, the dunnage may fall down and we have to pile it up again.

By the Court:

Q. Was it dark down there in the hold? A. No, sir.

Q. Suppose there had been water in the stringers could you have seen the water? A. Yes, sir.

Q. If there had been just a little water so it
2256 was wet on the bottom of the stringers would you have seen it? A. If there was any sign of water at all I could have seen it.

Q. Where do you get your light from? A. It was the middle of the day.

Q. But you are way down in the hold. You get it through the hatches I suppose? A. Yes, sir, through the hatches.

Q. Would that light the wings of the ship in such a way you could see whether the stringer plates were dry? A. Yes, sir, I could.

2257

CHARLES M. TIFFANY, recalled for the claimants, testifies:

By Mr. Kirlin:

Q. There has been some testimony about a scupper pipe and housing of it in No. 3 hold. Whereabouts was that scupper pipe with reference to the place where the damage occurred on the starboard side? A. I should say it was about 10 or 12 feet from it.

2258

Q. Forward or aft of it? A. Aft of it.

Q You heard Mr. Davis's testimony, did you? A. Yes, sir.

Q. Can you state whether the holes that were made through the stringer plates for the purpose of allowing the pipe to pass down were between the cargo battens and the side of the ship, or outside of the cargo battens—that is in the hold? A. There is no construction of any ship I have ever seen but that the scupper pipe always goes right down to the rib of the ship next to the plates themselves.

2259

Q. Have you ever seen a scupper pipe going down outside the cargo battens in the hold? A. Yes, sir.

Q. Did it go down outside of the battens in this ship? A. No, sir, it did not, it went next to the plates.

Q. Between the battens and the plates? A. Yes, sir. You put a scupper pipe inside of the cargo battens and load with railroad irons and you would have a scupper pipe about 25 minutes after you got in the seaway.

2260

By The Court:

Q. First comes the ship? A. The bare outside of the ship; next, the ribs; next, your angle-irons or braces.

Q. Where is the pipe, inboard from all these

2261 things? A. Inboard, next to the plate of the ship, your braces or ribs of the ship are some 50 or 60 inches, some 80.

Q. Does the pipe run right along the ribs or the plates of the ship? A. Yes, sir, right down between the ribs, right alongside of the plate—the scupper-pipe. Of course if it is a pipe leading to the ballast tanks that would run along the bulk-
2262 heads but this runs from the between decks.

Q. What do you mean by the cargo-battens? A. The cargo-battens are battens put along the ribs of the ship to protect cargo from getting into the plate, longitudinally.

This is of course inside of those because those are inside of the ribs?

MR. KIRLIN: Mr. Davis indicated the pipe he examined was out in the hold outside of those.

2263

Q. Is there a wooden casing to these pipes? A. In some ships, and in some not.

Q. That goes between the ribs of the ship? A. Yes, sir.

Q. And right up against——A. The side of the ship.

By Mr. Kirlin:

Q. Where do you say that frame was—between
2264 the battens and the side of the ship or out in the hold? A. Between the battens and the plates of the ship.

Q. How much light is there down in the hold of that ship? A. That ship had a 24-foot hatch by 14 and in the middle of the day you can see to read a paper standing on the stringer in the hold.

Charles M. Tiffany.

CROSS EXAMINED by Counsel for Libelants:

By Mr. Brown:

Q. Did you see the scupper-pipe on the *Folmina* in No. 3 hold or its casing? A. I made no examination of the pipe at all. I know where it is located and where all scupper-pipes are located in ships always.

2265

Q. In giving this testimony about that pipe have you been giving your general information of how ships are usually constructed? A. How ships are usually constructed.

2266

Q. Just how the *Folmina* was constructed you don't mean to say? A. I know the *Folmina* was constructed the same as any other ship.

Q. You assume she was? A. I would be willing to swear to it. There is nobody but an insane man would put a scupper-pipe inside of the battens.

Q. You testified the scupper-pipe was 10 feet abaft the damaged cargo on the starboard side. Is that your testimony? A. That is my testimony.

2267

Q. You are positive of that, are you? A. Yes, sir. Some holds have two scupper-pipes besides.

Q. How close to the after bulkhead of that hold was the scupper-pipe? A. It might have been a foot. It is generally between the frame of the ship and where the bulkhead is joined to the next rib; It might be 10 inches or some 4 inches.

Q. It is a very short distance from the bulkhead separating No. 3 from No. 4 hold. Is that right? A. What is No. 4 hold brought in for?

2268

Q. I am not under examination. A. I don't understand your question.

Q. What was the bulkhead between No. 3 and No. 4 ? A. An iron bulkhead.

Q. Was it within a few inches of that bulkhead —the scupper-pipe? A. I testified it was.

Q. You are positive that scupper-pipe was aft not forward? A. I told you some ships had two scupper-pipes.

2269 Charles M. Tiffany.

Q. Was it near the after and not the forward bulkhead? A. I think there is another scupper-pipe in the forward part of the ship's hold, two on both sides.

Q. How many scupper-pipes were there in No. 3 hold? A. I think two on each side.

Q. You are not positive? A. I am not positive. Some only have one, it depends on the length of
2270 the between decks.

Q. Isn't it the fact you don't remember what there was on the *Folmina* but you are speaking from the general construction of ships in general? A. I am speaking of the construction of ships in general.

Q. You wouldn't say how close the scupper-pipe ran to the cargo-battens? A. The scupper-pipe ran inside of the cargo-battens between the ribs of the ship and the plate.

2271 Q. Attend to my question. Do you pretend to say how far in that interval between the battens and the skin of the ship the scupper-pipe was placed? A. I wouldn't say; close in.

Q. Snug to the cargo-battens or skin of the ship? A. I wouldn't pretend to say because it wouldn't make any difference I don't think.

2272

Libelants' Exhibit 1.—November 28' 1902. 2273

(Copy)

NEW YORK DOCK COMPANY,
Morris Building, 68 Broad Street

Secretary's Office. New York, June 10, 1902.

MESS. G. A. JAHN & Co.,
98 Wall St., City.

Gentlemen:

2274

In reply to your inquiry, we beg to say that the 10,693 bags of rice received by us in May 1901 in Union Store No. 137 on the 5th and 6th floors, ex Steamer *Taormina,* in bond were not in the contact with salt or other material which would damage said rice, while it remained in said store No. 137, and also that no salt was stored in this warehouse during the period that the rice remained there.

Yours truly

2275

H. E. NITCHIE,
Asst. Sec'y.

2276

2277 **Libelants' Exhibit 2.**—November 28, 1902.

(Copy)

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN & Co.,
Libellants,

2278

AGAINST

The Steamer "FOLMINA," her engines, etc.

It is hereby stipulated and agreed between Messrs. Convers & Kirlin, proctors for the claimant, and Messrs. Butler, Notman, Joline & Mynderse, proctors for the libellants, that 876 bags of rice arriving by the steamship *Folmina,* which were reshipped to London on board the s. s. *Minnehaha* of the Atlantic Transport Line May 31, 1901, received no damage by sea water or rain while they were on board said steamship *Minnehaha.*

2279

Dated, New York, November 21, 1901.

CONVERS & KIRLIN
Proctors for Claimants.

2280

BUTLER, NOTMAN, JOLINE & MYNDERSE
Proctors for Libellants.

Libelants' Exhibit 3.—November 28; 1902. 2281

(Copy)

RICHARD GOUGH & Co.

11 and 13 William Street,
New York, June 19, 1902.

MESSRS. G. A. JAHN & Co.,
Dear Sirs:

In response to your inquiry as to the condition of the box of samples of rice, ex. *Folmina* 2282
sent from England in July 1901, we write to say that we received the package and that so far as any external examination showed it was in good order and condition. The wrapping was in good order and dry, and no indications of breakage dampness or other damage appeared.

We did not open the package but sent it directly to you in the same condition as received by us.

Very truly yours,
RICH'D GOUGH & Co. 2283

Libelants' Exhibit 4. (By consent.)

The "Folmina." New York, 3 June, 1903.

MESSRS. BUTLER, NOTMAN, JOLINE & MYNDERSE.
Dear Sirs:

Replying to your request for information as to the appearance and disposition of the package of samples of rice from the *Folmina* received 2284
by us from England through Messrs. Richard Gough & Co., we write to say that when the package reached us from Messrs. Gough & Co. in August 1901, it was in good condition as far as could be told from its exterior appearance.

On receipt of this package we delivered it in the same condition as received by us to Messrs. Putnam, Kissam & Koehler to make arrangements for testing and analysis.

Very truly yours,
(sgd) GUSTAVE A. JAHN & Co.

2285 **Libelants' Exhibit 5.** (By consent.)

PUTNAM, KISSAM & KOEHLER.

New York, May 11, 1903.

MESSRS. BUTLER, NOTMAN, JOLINE & MYNDERSE,
54 Wall Street, City.
"Folmina."

Dear Sirs:-

Replying to your favor of the 7th inst., I beg
2286 to say that I cut some samples of the bagging on the rice in No. 3 hold of the *Folmina* and took some pieces of damaged rice while on board this steamer on May 17th, 1901, of which I made our usual test for salt with nitrate of silver.

On August 19, 1901, I gave Messrs. Sherer Brothers six samples of this bagging, three of damaged bags and three of sound bags; also two samples of damaged rice and one sample of sound rice. This rice had been sent to us by Messrs.
2287 G. A. Jahn & Co., and we were informed by them that the samples of rice which were given us came from England. I surrendered these in the same condition as received.

At the request of Messrs. Sherer Brothers we asked for and Messrs. G. A. Jahn & Co., sent us, on August 27, 1901, six entirely sound bags from this cargo, of which we cut and gave Messrs. Sherer Brothers four samples on August 28, 1901.

Yours very truly,

2288 FRANK F. KOEHLER.

This letter appears on page 261 of testimony, but was not marked: 2289

Pferdemenges, Preyer & Co.
Liverpool, Bremen, New Orleans, Savannah, Galveston.

Adelaide Buildings,
Chapel Street.

Liverpool, 11th June 1901.

Messrs. Molineux & Walker,
London. 2290

Dear Sirs:

We duly received your memo of 6th inst., and now beg to enclose Bill of Lading & Landing certificate for

G A J & Co 876 Bags rough Japan rice
1/23

shipped per *Minnehaha* (s) to order to London.

Gough writes under date of 1st inst. requesting us to have the rice sorted out, and disposed of to the best advantage for their account. 2291

The rice is more or less damaged and we are sending it to London as we presume or consider it the best market.

The rice is ex *Folmina* just arrived from Japan direct, and was shipped by Popp & Co.

Gough says you wrote that Japan rice is scarce, and in demand, and they hope for good results.

Yours faithfully,
PFERDMENGES, PREYER & Co.

2292

(Endorsement.)

This is the letter N G M 1 put in in the examination of Mr. N. G. Molineux, March 7, 1902.

ARTHUR B. LANGRIDGE.

2293 This letter appears on page 260 of testimony but was not marked:

(Copy)

Newlands Bros. & Ling,
Analytical & Consulting Chemists.
Laboratory,
2 St. Dunstan's Hill,
London, E. C., 17th Decr., 1901.

Messrs. Waltons, Johnson, Bubb & Whatton,
101, Leadenhall Street, E. C.

2294 Dear Sirs,

Rice per "Folmina."

I have examined eight samples of Rice, representing eight parcels, making a total of 875 Bags, marked *"C. S. D."* ex *Minnehaha* which were handed to us by Mr. N. G. Molineux of the firm of Messrs. Molineux & Walker, of 9, Mincing Lane on the 2nd of December, with the following result:

No. of Bags in Parcel.	*Per cent. Chloride of Sodium* (Common Salt).
48	.028
524	.032
166	.054
8	.053
5	.026
56	.026
6	.032
62	.144

2295

2296 From the amount of common salt contained in these samples and its varying quantity I have come to the conclusion that the whole of them are damaged by sea-water.

Yours faithfully,
(Signed) B. E R. NEWLANDS.
Vice-President Institute of Chemistry, Late and of Society of Chemical Industry; Fellow of Chemical Society; Member Society Public Analysts.

Libellant's Exhibit B. 2297

EASTERN TRADE BILL OF LADING —INWARD

No. 4 Via Suez Canal.

Shipped in good order and condition by Popp & Co. on board the British steamship whereof is master for this present voyage, lying in the port of Kobe, and bound for New York, via the Suez Canal, with liberty to discharge and receive goods and passengers at customary port 2298 and ports as advertised and to take in coal or other necessary supplies at any intermediate Port or Ports, to sail with or without Pilots, to tow and assist vessels in all situations of distress, and to tranship the goods by any other steamer,— Eleven thousand two hundred bags Rice, each bag said to weigh 200 lbs nett, being marked and numbered as per margin, and to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from 2299 the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of New York unto ORDER, or to his or their assigns, he or they paying freight for the said Goods on delivery, by approved 60 days' sight drafts on London (with interest, if required, at not less than at the rate of 5 per cent per annum, if not so paid) at the rate of (30/—) Thirty shillings per ton of 20 Cwt net delivered on measurement or weight taken in Kobe. 2300

The following are the exceptions and conditions above referred to:

1.—Weight, measure, quality, contents and value unknown.

2.—The Act of God; the Queen's Enemies; pirates, robbers by land or by sea; restraint of princes, rulers or people; strikes; loss or damage from machinery, boilers, or steam, or from explosion, heat or fire on board, in hulk or craft,

2301 or on shore; jettison, barratry, misfeasance, error in judgment, any act, neglect or default whatsoever of Pilots, Master or Crew in the management or navigation of the ship; collision, risk of craft, or hulk, or transhipment and all and every the dangers and accidents of the seas, rivers and canals, and of navigation of whatever nature or kind are excepted.

3.—The ship is not liable for insufficient packing, or reasonable wear and tear of packages; for
2302 inaccuracies, obliteration or absence of marks, numbers, address or description of goods shipped; leakage, breakage loss or damage by dust from coaling on the voyage; sweat, rust, decay, vermin, rain, spray. Fines and expenses, and losses by detention of Ship or cargo, caused by incorrect marking, or by incomplete or incorrect description of contents or weight, or of any other particulars required by the authorities at the port of discharge upon either the packages or bills of lading,
2303 shall be borne by the owners of the goods.

4.—The steamer, while detained at any port for the purpose of coaling, is at liberty to discharge and receive Goods and Passengers.

5.—The owners of the steamer will not be accountable for Gold, Silver, Bullion, Specie, Jewellery, Precious Stones, or Precious Metals or beyond the amount of One hundred Pounds for any one package, unless the Bills of Lading are signed
2304 for such goods and the value described therein.

6.—If Medicinal Fluids, or any other goods of an inflammable, damaging or dangerous nature are shipped without being previously declared and arranged for, they are liable, upon discovery, to be thrown overboard, and the loss will fall upon the Shippers or Owners of such Fluids or Goods.

7.—One clear working day after the day on which the ship reports at the Custom House, and is docked, is to be allowed for applications for de-

livery; and if thereafter the goods are not removed without delay by the consignee, the master or agent is to be at liberty to land and warehouse the same; or, if necessary, to discharge into hired lighters, at the risk and expense of the Owners of the Goods. 2305

8.—In case of Quarantine, the Goods may be discharged into quarantine depot, hulk or other vessel, as required for the ship's despatch. Quarantine expenses upon the goods, of whatever nature or kind, shall be borne by the Owners of the Goods. 2306

9.—In case of the blockade or interdict of the Port of discharge, or if the entering of or discharging in the Port shall be considered by the Master unsafe by reason of war or disturbances, the Master may land the goods at the nearest safe and convenient Port, at the expense and risk of the Owners of the Goods; and the Ship's responsibility shall cease when the Goods are so discharged into proper and safe keeping, the Master giving immediate notice of the same to the Consignees of the Goods so far as they can be ascertained. 2307

10.—This contract shall be governed by the Law of the Flag of the vessel carrying the Goods, except that general average shall be adjusted according to York-Antwerp Rules, 1890.

11.—The Master or Agent shall have a lien on the goods for payments made, or liabilities incurred, in respect of any charges stipulated herein, to be borne by the Owners of the Goods. 2308

IN WITNESS WHEREOF the Master or Agent of the said Ship has signed three Bills of Lading, exclusive of the Master's copy, all of this tenor and

2309 date, one of which being accomplished, the others to stand void.

Dated at Kobe, 31st January, 1901.

D & CO LTD.

(Margin of the Bill of Lading is as follos).

New York.

DODWELL & Co., LTD.- Agents.

G A J & C,- 11,200 Bags

1/23

2310 *The steamer's hatches to be kept open during the voyage as often as the weather will permit. No nooks allowed stowing and discharging the rice.*

Freight payable New York.

Say Tons, 1000 at £30/- per Ton,- £1,500 British Sterling. per ton of 20 Cwt. nett delivered.

(Marginal clause in red ink.)

3311 The collector of the port is hereby authorized to grant general order for immediate discharge of cargo upon entry of the steamer at the Custom House.

(Stamped)

MASTER'S COPY.

2312

Claimant's Exhibit 5. 2313

(Copy)

July 29, 1901, EHC, Sten.

BEAUFORT SCALE FOR RECORDING THE FORCE OF WIND.

0	Calm	Stilte
1	Light air	Koelte
2	Light breeze	Lichtehoelte
3	Gentle breeze	Flauwe koelte
4	Moderate breeze	Nanwakkerende koelte
5	Fresh breeze	Frissche koelte
6	Strong breeze	Stijue koelte
7	Moderate gale	Windrlagen
8	Fresh gale	Toenemende windrlagen
9	Strong gale	Lware windrlagen
10	Whole gale	Nanhoudende windrlagen
11	Storm	Orkaan
12	Hurricane	Storm

2314

2315

2316

2317 OPINION.

November 17, 1906.

THOMAS, *J.*

The steamship *Folmina*, between February 4th and May 9th, caried in No. 3 lower hold rice in bags, from Japan to NewYork. During discharge the rice on the starboard side was found damaged. The area of the injury was downward from the
2318 first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. Planks several inches apart were fastened to and ran longitudinally along the perpendicular frames connected with side plating of the ship and about nine inches therefrom, and athwart such planks were arranged bamboo poles, two or thee inches apart, and the lattice work thus formed supported mats. The
2319 bulkheads of the hold were similarly protected, and the ceiling was covered with dunnage, laid fore and aft, a second layer athwartship to which mats were attached. Three iron stringers, the upper one five feet, the middle one ten feet, and the lower one fourteen feet, two inches below the between-decks, were fastened to the perpendicular frames, with their outboard edges attached to the plating of the ship, from which their inboard side was distant about two feet. Angle-irons were at-
2320 tached to each stringer, whereby was formed a trough, in its greater part about fifteen inches wide and three and a half inches deep. It ran the whole length of the hold, in which dunnage planks were placed, but any water entering the trough could escape at the ends of the hold, where holes were provided therefor. During and after the discharge it was found that either there was water standing in the trough for some distance, or at least that it was wet. The dunnage, poles, and mats were in a condition variously described as

"damp," "wet," "wringing wet," "sopping wet," 2321
"soaking wet"; the bags were described as "wet," "damp," "stained," "very wet," "hot," "black and rotted"; the rice as "off color," "caked," "mouldy." The odor from the mass was noticeably bad. That many of the bags and rice therein were impaired, seriously injured or destroyed by the dampness and heat cannot be doubted. There was some evidence of negligible damage to the bags on the port side. The libel states that the rice was delivered, 2322

> "but not in like good order and condition as when received, 877 bags of said rice being wet with sea water and 8564 bags thereof being seriously damaged by heating, owing to the proximity of said wet bags or through some other cause to the libellants unknown, at the time of said delivery to the libellants."

The answer alleges that the damage was caused by "sweat or heat, or by the inherent deterioration 2323
due to its condition at time of shipment," and that the condition of the goods on arrival was the result of

> "Sweating, heat or natural decay due to the inherent and natural condition of the goods or to the latent dampness thereof due to wetting in craft in coming to the ship or while in store or on shore, or to defects in the preparing of said goods for shipment, or to perils of the seas, rivers or navigation within the 2324
> meaning of the foregoing exception, and that the said condition of the said goods and the damage, if any, resulting therefrom, were not consequent upon any neglect or default on the part of the Steamship or those in charge thereof."

The bill of lading exempted the carrier from liability for any loss or damage from

> "The act of God * * * loss or damage

2325 from machinery, boilers or steam, or from explosion, heat or fire on board, in hulk or craft or on shore * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind.

The ship is not liable for insufficient packing or reasonable wear and tear of packages * * * leakage, breakage * * * sweat,
2326 rust, decay, vermin, rain spray."

The evidence shows that the damage was caused by sweat and heat, or sea water and consequent heat.

For some purposes of discussion let it be assumed that sea water entered and injured the cargo. Yet the evidence shows that it did not enter by reason of any negligence on the part of the master or crew, or of the carrier in outfitting
2327 the ship for the voyage. Hence, the invasion of the sea was beyond the cognizance or avoidance of the carrier or his servants, and without the fault of either. What was demandable of owners or crew to keep out sea water they did. There was upon arrival at New York no defect in the ship that accounted for the sea water. None was discovered during the voyage, whose history also shows that the crew by culpable action or omission did not suffer it to enter. Hence, when the
2328 libellant charges receipt of sound goods and delivery of the same injured by sea water, the carrier shows that neither he nor his servants were negligent in connection with the suggested injurious cause. The rule that when the fact is in doubt, or the Court is in doubt as to the fact, the burden is on the carrier to solve the doubt, has been fully met. The carrier points to a sound ship, to which sea water could not gain access, and shows the existence of such condition during the voyage, and due preparation of the ship for the protection

of the cargo, and ample care during the voyage. 2329
Satisfactory and uncontradicted evidence that no defect discoverable in the exercise of requisite care existed between the receipt and discharge of the cargo is maximum proof. Evidence can produce no higher probative effect. Pass in review the variety of ways that sea water could enter, and the carrier's evidence meets them one by one and negatives not only the presence of every such opportunity, but also any negligence that would permit it. Both the fact and fault permit- 2330
ting its existence are absent. Immediately one suggests any practical way for sea water to enter, for instance around the scupper-pipe, the ship is shown to have been sound in such respect. Was the way through a yielding plate? Not a strained or started rivet nor stained plate justifies even suspicion. Was the entry through the ventilators or hatches? They are shown to have been closed during all weather that would permit it, and the sound condition of the hold spaces and other cargo 2331
disputes the possibility. Yet the libellants persist that the ship should, to free itself, make further disclosure. Why? Conjecture even as to the cause has been exhausted, and the carrier to such limit has shown his innocence. Neither imagination nor experience suggests any way for the sea water to enter that is not negatived, or at least the evidence shows that the carrier did not contribute to it. Hence, the highest and most comprehensive proof has been reached. When it ap- 2332
pears that the carrier not only used due diligence to furnish a seaworthy ship, but did actually furnish the same, that he used proper care in stowing the cargo, that his servants did not by undutiful act or omission suffer the cargo to be injured, that no defect was discovered during the voyage, and none existed at its termination, the carrier and his servants at least are not chargeable with negligence. Neither is the carrier in this case liable as an insurer, for he expressly

2333 stipulated against damage from sea water, to which was impliedly attached the proviso that his own and servants' fault did not aid or suffer the same. Now the absence of the fault has been shown. Hence the proviso has been met and the stipulation for exemption takes effect. There may be some mystery about the damage. There would be none if the fact were that sweat and heat caused the injury, and there would be no difficulty in finding that as fact, if the report of
2334 the libellants' analysts had not shown an undue proportion of salt in the bags and injured rice. The claimant's contention, that the rice absorbed the remnant of mineral salt on an earlier voyage carried in the same hold, may have some value. If the injurious cause was sea water, its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibili-
2335 ty of discovering how the sea water could enter a sound and properly navigated ship, strongly aid the evidence that it did not enter. But that is left undecided. If the injury was the result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. Clark *v.* Barnwell, 12 How. (U. S.) 282; The Prussia, 93
2336 Fed. Rep. 837, 840.

If the injury arose from sea water, without the carrier's fault, he is released by the stipulation, provided he shows that fact. Clark *v.* Burnwell, *supra;* Transportation Co. *v.* Downer, 11 Wall. 129; Can *v.* Texas and Pacific Ry. Co., 194 U. S. 427.

The evidence shows that it did arise either from heat and sweat, or sea water and consequent heat. Hence, the case is within the exception, and in either alternative the evidence exculpates the ship.

In the present case the ship, from physical examination, appears to have been absolutely seaworthy at every stage of the adventure. To this it is answered that she was not seaworthy when and where the assumed sea water entered; and to this it is replied that the owner and his servants used diligence respecting every part or equipment whereby water, by any conjecture, could enter. Considering the recent construction of the vessel, her use and care after construction, the dry docking in New York preliminary to her Eastern voyage, the inspection and care of the hold before the rice was loaded, the fact that she appeared in perfect condition upon her arrival, even to the degree that not a single supicious condition appeared, all this points to but one conclusion, that the owners or their agents used due care in sending out from Japan, and the crew discovered no defect on the way, and that no defect was discoverable. It does not seem just to condemn a ship with such a history. 2337 2338 2339

The decision is placed upon the ground that the facts show that the ship was not negligent, although the Supreme Court has decided, Clark *v.* Barnwell, *supra,* Transportation Co. *v.* Downer, *supra,* Cau *v.* Texas and Pacific Ry. Co., *supra,* that when the carrier shows that a sea peril, in this case sea water, within the exception of the bill of lading, did the damage, the burden is upon the shipper to prove that the carrier's negligence intervened. But for these decisions it would seem that such position could not be sustained logically or by reference to recognized and pertinent legal principles. But in view of the succession of authoritative rulings, and of the respect due them, discussion at this time is precluded. 2340

The libel will be dismissed with costs.

2341 At a Stated Term of the United States District Court for the Eastern District of New York held in the Court Rooms of the Post Office Building in the Borough of Brooklyn, City of New York, on the 20th day of November, 1905.

Present—Honorable EDWARD B. THOMAS,
U. S. District Judge.

2342

GUSTAV A. JAHN and WILLIAM J. GRIFFITHS,
Libelants.

AGAINST

The Steamship "FOLMINA," WILLIAM VANEYKEN,
2343 Claimant.

} Final Decree.

This cause having come on to be heard on the pleadings and proofs adduced by the respective parties and having been argued by the advocates for the respective parties and due deliberation having had,

Now, on motion of Convers & Kirlin, proctors for the claimants herein, it is hereby

2344 Ordered, adjudged and decreed that the libel herein be dismissed with costs to the claimant as against the libelants and that the claimant herein, William Van Eyken, have, receive and recover of and from Gustav A Jahn and William J. Griffiths, the libelants herein, and Abram Wakeman, their stipulator for costs, the sum of $441.65, the costs of the claimant as taxed herein, together with interest thereon until paid, and it is further

Ordered, that unless proceedings on this decree shall be stayed by an appeal or unless this decree

shall be fulfilled or satisfied ten days after service 2345
of the notice of its entry on the libelants or their proctors, Abram Wakeman, the stipulator on the libelants' stipulation for costs, cause the engagement of his stipulation to be performed or show cause within four days thereafter or on the first day of jurisdiction to answer why execution should not issue against him, his lands, goods and chattels, according to his stipulation.

EDWARD B. THOMAS, 2346
U. S. J.

[Endorsed:]—Final decree—Filed and entered the 20th day of November, 1905.

2347

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2349 DISTRICT COURT OF THE UNITED STATES,

EASTERN DISTRICT OF NEW YORK.

GUSTAV A. JAHN and WILLIAM J. GRIFFITHS,
Libelants,

2350 AGAINST

The Steamship "FOLMINA," WILLIAM VANEYKEN,
Claimant.

Please to take notice that the libelants herein hereby appeal from the final decree made and entered herein on the 20th day of November, 1905,
2351 to the next United States Circuit Court of Appeals for the Second Circuit, to be held in and for the said Circuit at the City of New York,

Dated, New York, 22 January, 1906.

Yours etc.,
BUTLER, NOTMAN & MYNDERSE,
Proctors for Libelants,
54 Wall Street, Manhattan,
New York City.

2352 To MESSRS. CONVERS & KIRLIN,
Proctors for Claimant
of the steamship FOLMINA,
5 Beekman Street,
New York City.

[Endorsed:]—Notice of Appeal.—Filed January 22, 1906.

DISTRICT COURT OF THE UNITED STATES, 3253

EASTERN DISTRICT OF NEW YORK.

GUSTAVE A. JAHN, & Another,
Libellants.

vs.

The Dutch Steamer "FOLMINA;"
WILLIAM VAN EYKEN,
Claimant. 3254

The libellants hereby assign error in the decision and decree of the District Court herein, in the following particulars:

FIRST.—In that the Court made a decree dismissing the libel herein; and in that it did not by its decree award to the libellants the damages sustained by them as alleged in the libel together with interests and costs. 2355

SECOND.—In that the Court entered a decree in favor of the claimant and against the libellants in the sum of $441.65 as costs, or in any sum whatever.

THIRD.—In that the Court made no finding as to whether the damage mentioned in the libel was due to contact with sea-water or was due to sweat; and in that it did not find that said damage was due to contact with sea-water. 2356

FOURTH.—In that the Court found that there was an express contract or stipulation between the carrier and the shipper by bill of lading or otherwise, exonerating the carrier from liability

2357 for damage from sea-water; and in that the Court did not find that there was no contract or agreement between the parties with reference thereto but merely an agreement purporting to exonerate the carrier from liability for "all and every "the dangers and accidents of the seas, rivers and "canals and of navigation or whatever nature "or kind."

FIFTH.—In that the Court held that if the injury
3258 arose from sea water without the carrier's fault, the carrier is not liable; and in that the Court did not hold that if the injury arose from sea water without the carrier's fault the carrier must be held liable unless he is able to show the manner in which sea water entered the hold of the ship and obtained access to the cargo, and to show that such entrance was due to a peril of the sea or to some other cause excepted by the bill of lading.

2359 SIXTH.—In that the Court held that the admission of sea water into the hold of the ship is of itself a sea peril.

SEVENTH.—In that the Court found that the carrier furnished a seaworthy ship and that no defect in the steamer *Folmina* existed at the inception of the voyage, during the voyage or at its termination; and in that the Court did not infer from the otherwise unexplained admission of seawater
2360 into the hold of the *Folmina* upon an ordinarily calm voyage that the ship was not seaworthy, and that an undiscovered defect permitting such water to enter existed in said ship; and in that it did not find accordingly that said ship was unseaworthy.

EIGHTH.—In that the Court found that there was no negligence on the part of the owner, master or crew of the *Folmina* in permitting sea water to enter the hold of said vessel; and in that it did not from the unexplained admission of said sea water infer such negligence.

NINTH.—In that the Court found that the owner of the *Folmina* used due diligence to make said vessel seaworthy in hull and equipment. 2361

TENTH.—In that the Court held that if the damage was due to the unseaworthiness of the steamer *Folmina* it was a sufficient defense that the owner of said vessel and his servants had used due diligence to make her seaworthy; and in that it did not hold the owner of the *Folmina* liable for the absolute seaworthiness of his vessel. 2362

ELEVENTH.—In that the Court held that the burden of explaining the damage and showing the carrier's negligence rested upon the shipper; and in that it did not hold that the burden rested upon the carrier to explain the damage and to prove his freedom from negligence and that the damage was due to a cause excepted by the bill of lading.

New York, May 19, 1906.

BUTLER, NOTMAN & MYNDERSE, 2363
Proctors for the Libellants & Appellants.

[Endorsed:]—Assignments of Error, Filed May 24th, 1906.

2364

2365 UNITED STATES OF AMERICA } ss.:
Eastern District of New York. }

I, RICHARD P. MORLE, Clerk of the District Court of the United States for the Eastern District of New York, do hereby certify that the foregoing is a correct transcript of the record in the case of Gustave Jahn and another against the steamship *Folmina*, her engines, etc., made up to be transmitted to the United States Circuit Court of Ap-
2366 peals for Second Judicial Circuit, pursuant to rule.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 19th day of July, 1906.

RICHARD P. MORLE,
Clerk.

[Endorsed:]—United States Circuit Court of Ap-
2367 peals for the Second Judicial Circuit—Gustav A. Jahn and William J. Griffiths Libellants-Appellants against the Steamship *Folmina*, her engines, etc., William Van Eyken Claimant-Appellee.—Transcript of Record. Appeal from the District Court of the United States for the Eastern District of New York. —United States Circuit Court of Appeals, Second Circuit.—Filed Aug. 8, 1906.—William Parkin, Clerk.

2368

UNITED STATES CIRCUIT COURT OF APPEALS, 2369

SECOND CIRCUIT.

Before LACOMBE, TOWNSEND AND COXE,
Circuit Judges.

GUSTAVE A. JAHN and another,
Libellants-Appellants, 2370

vs.

The Steamship "FOLMINA,"
WILLIAM VAN EYKEN,
Claimant-Appellee.

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, brought to recover 2371
for cargo damage against the S. S. *Folmina*. The opinion below is reported in 143 F. R., 636. The steamship sailed from Kobe, Japan, for New York, with No. 3 lower hold filled with rice in bags. During discharge the rice on the starboard side was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. 2372
The damage was caused by water and consequent heat.

The bill of lading exempted the carrier from "The act of God * * * loss or damage from * * * explosion, heat or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, de-

2373 cay, vermin, rain spray." It is manifest upon the proofs, and no one disputes, that the damage was caused either by sweat and heat, or by sea water and consequent heat. The district judge found the evidence not sufficient to satisfy him as to which of these two causes was responsible for the damage. He exonerated the ship because she had "stipulated against damage from sea water" and also against damage from heat and sweat. He says:

2374 "If the injurious cause was sea water its means of access is beyond the bounds of human research or discovery, and the law should not require the performance of impossibilities, as a condition of a carrier's exculpation. Indeed, the impossibility of discovering how the sea water could enter a sound and properly navigated ship strongly aids the evidence that it did not enter. But that is left undecided. If the injury was the

2375 result of sweating, heat, or natural decay due to the inherent and natural condition of the goods, the ship is not liable, unless the act or omission of the owner or his servants intervened to incite or to aid such cause, which is not the case. If the injury arose from sea water, without the carrier's fault, he is released by the stipulation provided he shows the fact. * * * When the carrier shows that a sea peril, *in this case sea water*, within the exception of the bill of lading did the damage, the burden is upon the shipper to prove that

2376 the carrier's negligence intervened."

Per Curiam:

The opinions of the three members of the Court upon the questions presented in this case are so discordant that no good purpose will be served by any detailed statements of the reasons by which they reach their several conclusions; it will be sufficient to indicate what those conclusions are.

Evidently the conclusion of the district judge

was arrived at by first determining upon whom 2377
the burden of proof rested. And it would seem that in determining that preliminary question he assumed that the bill of lading stipulated against damage by "sweat" and damage by "sea water." The stipulations, however, are in fact against damage by "sweat" and damage by "perils [dangers and accidents] of the seas." This Court recently considered the question of burden of proof in the case of *The Patria,* where the exceptions were "perils of the seas" and "decay of any 2378
kind"; and expressed itself as follows:

"It is, no doubt, the rule, as appellant contends, that when the damage is manifestly of the sort excepted, the ship is under no obligation to show the promoting cause. To illustrate, if the exception is 'damage caused by peril of the sea,' and the cargo is landed drenched with salt water, it will be for the ship to show that the salt water found access to the cargo through a peril of the sea; but, if the exception is 'damage by break- 2379
age,' and the article arrives broken, the ship is not required to show how it got broken—although the libellant may show that negligence of those on the ship, or of those who stowed her or discharged her, caused the break, and, showing that, may recover. If the sole damage to the cargo in the case at bar were manifestly decay, and the language of the exception were, as the respondent states in his brief. 'for decay caused by inherent defect,' the ship would have the burden of show- 2380
ing that the decay was caused by inherent defect. If, however, the sole damage was manifestly decay, and the language of the exception were, as given in the bill of lading, 'not responsible for damages occasioned by decay of any kind,' the appellant would be right in his contention, and, the cause of the decay not being shown to be negligence on the part of the ship, the libel should be dismissed." The *Patria,* 132 Fed. Rep., 971, 972.

One member of the court as at present consti-

2381 tuted is of the opinion that where the damage is caused by sea water the statement of the rule as given in the above excerpt is too broad. That under the English authorities (Hamilton *v.* Pandorf, 16 Q. B. D., 633; 12 App. Cas., 523), and subsequent cases), the shipowner is relieved when he shows that the damage is caused by sea water and there is no evidence that any fault, negligence or unseaworthiness of the ship allowed it to enter, and that the American cases (Hooper *v.* Rath-
2382 bone, Taney, 519; The *G. R. Booth*, 171 U. S., 450), are in accord with this construction. Therefore, although not satisfied by the proofs that the damage was caused by sweat he votes to affirm.

The other two judges adhere to the rule laid down in the *Patria*, but one of them is satisfied that the weight of evidence is to the effect that the damage was not caused by sea water but by sweat. Therefore he votes to affirm. The other judge is not persuaded by the evidence to a finding that the
2383 damage was caused by sweat and, believes that sea water was the cause. He does not think that, under the decision in the *Patria* case, the shipowner need show just how the water got in, but that he must show sufficient stress of weather to warrant the inference that it came in because of the action of external causes. And there being no evidence of such stress of weather he votes to reverse.

The result is that the decree is affirmed with
2384 costs.

[Endorsed:]—United States Circuit Court of Appeals, Second Circuit.—Gustave A. Jahn and ano., Libellants-Appellants, *v.* The Steamship *Folmina*, William Van Eyken, Claimant-Appellee.—Opinion, per Curiam.—United States Circuit Court of Appeals, Second Circuit.—Filed March 26, 1907, William Parkin, Clerk.

At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court Rooms in the Post Office Building, in the City of New York, on the 5th day of April, 1907. 2385

Present—Hon. E. HENRY LACOMBE,
Hon. WILLIAM K. TOWNSEND,
Hon. ALFRED C. COXE, 2386
Circuit Judges.

GUSTAVE A. JAHN and WILLIAM J. GRIFFITH,
Libellants-Appellants,

AGAINST

Steamship "FOLMINA," her engines, etc., WILLIAM VAN EYKEN, 2387
Claimant-Appellee.

Appeal from the District Court of the United States for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of New York and was argued by counsel. 2388

On consideration whereof it is now hereby

Ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with interests and costs. It is further

Ordered that a mandate issue to the said District Court in accordance with this decree.

E. H. L.
W. K. T.

2389 [Endorsed:]—United States Circuit Court of Appeals, Second Circuit.—G. A. Jahn *v.* *Folmina.*—Order for Mandate.—United States Circuit Court of Appeals, Second Circuit.—Filed April 5, 1907, William Parkin, Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS, 2393

FOR THE SECOND CIRCUIT.

GUSTAVE A. JAHN & Co.,
Libellants-Appellants,

vs.

The Steamship "FOLMINA," WILLIAM VAN EYKEN,
Claimant-Appellee. 2394

Petition for a rehearing and for the certification of a question of law to the Supreme Court of the United States:

The petition of the above named appellants respectfully shows to the Court and alleges as follows: 2395

The appeal in this cause was heard in this court before their Honors, E. Henry Lacombe, William K. Townsend and Alfred C. Coxe, on the 12 day of March, 1907, and on the 28 day of March, 1907, an opinion was handed down directing an affirmance of the decree below.

A majority of the Court are of the opinion that, as contended by your petitioners, the cargo damage was due to sea water; but one of the Judges believes that by the weight of evidence, the damage was not caused by sea water, but by sweat. Your petitioners humbly conceive that the dissenting Judge has overlooked the uncontroverted proof of salt (if not of sea water) damage and that due consideration of this proof must compel either assent to the finding made by the majority of the Court or a vote for reversal for the purpose of awarding compensation for the salt 2396

2397 damage. Your petitioners therefore desire a rehearing in order to enable due consideration to be had of the effect to be given to the proof aforesaid.

A majority of the Court adhere to the rule of law laid down in *The Patria*, 132 Fed., 971, 972, and relied on by your petitioners, under which rule a finding of sea water in this case would entitle your petitioners to a reversal. But one of the Judges is of the opinion that, in the absence
2398 of proof of unseaworthiness or fault on the part of the ship permitting sea water to enter, unexplained sea water in the hold of a ship, damaging cargo, is a "sea peril" for which the ship is not legally liable. Your petitioners humbly conceive that the Judge who thus rejects the *Patria* doctrine has been led by appellee's able and ingenious arguments to misapply the English and American cases upon which the conclusion purports to be based. They, therefore, desire a rehearing of this
2399 question also.

In the event that this Court shall be unwilling to grant a rehearing, your petitioners humbly pray that the question arising upon the *Patria* doctrine be certified to the Supreme Court of the United States for its instructions.

This application is based upon the following grounds:

1. *Salt damage.*

2400 The evidence was extremely conflicting as to whether the characteristics of the damage were consistent or inconsistent with the hypothesis of sweat damage. There was substantially no conflict in the evidence, however, as to the chemical constituents of the damaged samples.

Two cargo surveyors, employed by cargo underwriters, who made an investigation and reported before the question of the payment of the policy-loss was considered, and whose interests,

therefore, were favorable to the sweat theory, found by their nitrate of silver tests that the damaged rice and the bagging which contained the damaged rice showed unmistakable evidence of salt. 2401

Mr. Benjamin E. Newlands, a Fellow and the Vice-President of the Chemical Society and also of the Institute of Chemistry, two of the principal organizations in England devoted to chemical science, made a careful analysis of samples of the damaged rice, and reported a large excess of common salt. 2402

Mr. Alphonse A. Thomas, chief chemist for Sherer Bros., the principal firm of chemists in this country making a specialty of cargo-damage cases, also analyzed the damaged rice and bagging, and found a large excess of common salt; in fact, a quantity of salt that would be comparable with that resulting from entire submersion in seawater.

The integrity of the samples was scrupulously proved and has not at any time been questioned. 2403

The District Judge gave full credit to this testimony. He said:

> "There may be some mystery about the "damage. There would be none if the fact "were that sweat and heat caused the injury, "and there would be no difficulty in finding "that as a fact if the report of the libellants' "analysts *had not shown* an undue propor- 2404 "tion of salt in the bags and injured rice. "The claimant's contention that the rice ab- "sorbed the remnant of mineral salt on an "earlier voyage carried in the same hold, "may have some value."

Upon the argument and in appellee's brief, it was practically admitted by the steamer that, upon the voyage, the rice had suffered an admixture of salt, but it was contended that this was not due

2405 to seawater but to kainit. The statement just made is supported by the following, among many other passages in appellee's brief:

"But as the District Court found, folio "2334, the claimants have an explanation "of the presence of any salt which may "have been discovered, in the fact that, on "the voyage next previous to the voyage from "New York to Japan and back, in question
2406 "here, the *Folmina* carried a cargo of kainit, "a mineral salt, in bulk in No. 3 hold, from "Hamburg to Port Royal and Charleston, "South Carolina. The kainit, which is a "coarse ground salt, had worked in back of "the cargo battens in No. 3 hold and became "caked on the plating of the ship. It had "to be dug out of No. 3 hold with pick-"axes. * * * It is practically certain, "therefore, that there were many deposits
2407 "of kainit, more or less minute, perhaps "(1) on the side plating of the ship, (2) at "the frames where the cargo battens were "fastened to the frames, (3) where the string-"ers joined the frames, and (4) possibly on "the iron frames themselves, especially on "their under sides" (Brief, p. 49).

"The great percentage of sodium chloride "in kainit clearly shows that, if minute par-"ticles of it, clinging to the plating and the
2408 "battens, got drawn into the rice bags with "the sweat by the heat of the rice, the tests "of the damage from some bags might have "shown salt."

"*In fact, the tests practically show that "kainit did the damage.* * * * But these "tests" (by Putnam & Koehler) "were qual-"itative merely, and showed nothing but "that *some* salt was in the bagging, not that it "was salt from sea water" (Brief, pp. 53, 54).

"The results of these chemical analyses

"cannot, it is submitted, be of great weight, 2409
"in view of the fact that the last cargo the
"*Folmina* carried on her voyage from Eu-
"rope to the United States, before she started
"for the East, was kainit in bulk. The pres-
"ence of salts in the tests is easily accounted
"for by this fact, for the reasons and in the
"manner above described."

"The great variance in the percentage of
"salts shown in the samples is much more
"easily explainable on the kainit hypothesis 2410
"than on that of sea water * * * In fact,
"*every circumstance*, as well as the results
"of the tests, *points to the necessity of ac-*
"*cepting the kainit cargo as the explanation*
"*of the saline quality of some of the dam-*
"*age*" (Brief, pp. 56, 57).

"*It is submitted* that the damage is shown
"to have been due to sweat and heating, that
"sea water damage is precluded by the facts,
"and *that the salty quality in the tests is ex-* 2411
"*plained by the remains of the kainit* in bulk
"which had been carried on the preceding
"voyage" (Brief, p. 60).

The absorption by the rice, therefore, of saline constituents on the voyage is indisputably established by the proofs; is conceded by all the parties to this litigation; was found by Judge Thomas, and has been clearly found by the majority of this Court. 2412

It is impossible for your petitioners to believe that the Judge of this Court, who adhered to the hypothesis of sweat damage, intended to make a finding that there was no admixture of saline constituents with the rice on the voyage due to kainit or other cause.

Your petitioners believe, therefore, that it was his intention merely to find that the moisture apparent in the cargo at the time of its delivery was

2413 due to sweat, and that the salt found in the cargo was due to kainit.

Your petitioners humbly represent that it is indisputable from the chemical analyses and tests aforesaid that the cargo was damaged either by sea water or by kainit; that the former alternative is the more strongly supported by the proofs; but that the legal effect of a finding that the cargo was affected by sweat and kainit has not been fully or
2414 duly considered by the Court because your petitioners had no opportunity of preparing a reply to appellant's brief, and also because a time limit of one hour was strictly enforced by the Court upon the argument.

It is unquestionable that rice affected by sweat and saline constituents is less valuable than rice affected by sweat alone.

Your petitioners represent that rice is a commodity used for food; that the taste of the public
2415 does not permit the sale on equal terms of rice that is bitter with salt as of rice that is sound, whether the source of such salt be sea water or be a manure (Van Eyken, 1487), called kainit. The testimony is abundant to the point that salt water damage is more serious than fresh water damage or sweat damage.

E. Jahn, 1067.
Wright, 806.
Koehler, 600.
2416 Putnam, 171, and many others.

There is no testimony to the contrary, although there are several witnesses, without practical experience, who cannot distinguish by the eye alone between salt-water water damage and sweat damage.

Appellee's argument is that kainit contains all the constituents of sea water (Brief, pp. 50-53), and when dissolved in fresh water (or sweat) would have the same effect as sea water.

Your petitioners believe that the necessary consequence of supporting the sweat theory in this case is to order a reversal and direct a reference to ascertain the damage due to the admixture of kainit. 2417

The risk of damage to cargo on board ship through admixture with a foreign substance is the risk of the carrier, not the risk of the cargo owner; and this, too, whether the carrier be in fault or free from fault.

The H. G. Johnson, 48 Fed., 696. 2418

A ship which, at the inception of a voyage, has a foreign substance clinging to the sides of her hold or any part where there is risk of injuriously contaminating the cargo is not reasonably fit for the service and is not seaworthy.

The Southwark, 191 U. S., 1.

This cause was argued before the Court on the 12 of March, 1907. A copy of the appellant's brief, in typewritten form, was furnished to appellee's counsel the 11 of February, 1907, and galley-proofs were furnished to appellee's counsel several days later. On the 9 of March application was made at the office of appellee's proctors and counsel for a copy of appellee's brief, in galley-proof or in some other form, but said application was not complied with. No copy of appellee's brief in any form was received until the brief in final form was received on the 11 of March, 1907. On account of the engagements of Mr. Frederick M. Brown, who argued the cause for the appellants during the afternoon of said day, no use could be made of said brief until the morning of the 12 of March, the day of the argument before this Court; and it became impossible to make a careful study of the whole of said brief, including the 22 pages thereof that are devoted to the matter of kainit admixture. 2419 2420

2421 The treatment of the subject of kainit admixture in appellee's brief was substantially new, having been merely referred to incidently in the District Court. A reply to this portion of appellee's brief, which was imperatively needed, became therefore impossible.

2. *The Patria doctrine.*

In the opinion, it was said:

2422 "One member of this Court as at present constituted is of the opinion that where the damage "is caused by seawater, the statement of the rule "as given in the above excerpt is too broad. That "under the English authorities (*Hamilton* v. *Pan-*"*dorf*, 16 Q. B. D., 633; 12 App. Cas., 523, and sub-"sequent cases), the ship-owner is relieved when "he shows that the damage is caused by seawater "and there is no evidence that any fault, negli-"gence or unseaworthiness of the ship allowed it
2423 "to enter, and that the American cases (*Hooper* "v. *Rathbone*, Taney, 519; *The G. R. Booth*, 171 "U. S., 450) are in accord with this construction. "Therefore, although not satisfied by the proofs "that the damage was caused by sweat, he votes "to affirm."

But it is humbly suggested that the American cases referred to, instead of encouraging a departure from the rule adopted by this Court in the *Patria*, require its maintenance.

2424 In the *G. R. Booth*, by an explosion, water entered a seaworthy vessel, without her fault, and penetrating a bulkhead, damaged cargo located in a hold adjacent to that in which the explosion happened. This Court certified to the Supreme Court the question whether the loss was one occasioned by a sea peril. That Court ruled that it was *not* and that the ship was liable.

Here, as in the *G. R. Booth*, we have entrance of seawater, seaworthiness of the ship and freedom from fault (or at least no proof negativing the

last two elements). The only significant difference is that in the *Booth* case, the shipowner fully explained how the water entered; here he either will not or cannot explain; *a fortiori*, he should be liable. 2425

In *Hooper* v. *Rathbone* it was shown that seawater was admitted during a storm, although a storm "not violent enough to dismast her or carry "away her sails." Her pumps became choked and she was compelled to put into a port of refuge. The ship was "proved to have been among the 2426
"strongest ever built in Baltimore." Yet "this "ship, strong as she was, had been so strained by "the rough weather to which she was exposed "that she leaked considerably more than at the "beginning of the voyage and required a good "deal of caulking in her upper works to enable "her to proceed from St. Thomas to Liverpool."

Justice Taney very properly attributed the entrance of seawater to the storm, but there is not one line in the opinion to suggest that he con- 2427
sidered the mere non-negligent presence of seawater in a seaworthy ship as of itself a sea peril. And the case has heretofore been understood as announcing a doctrine of precisely the opposite character.

The Queen of the Pacific, 75 Fed., 74, 78.
The Lydian Monarch, 23 Fed., 298, 299.

But even the English cases do not support ap- 2428
pellee's view of the law.

The rule in *Hamilton* v. *Pandorf* is inadequate to appellee's necessities in the present case. There it was held that where the carrier *showed* the mode of entrance of seawater and that he was not in fault, he was not liable. Lord Halsbury says: "I cannot think it was less such a peril or "accident because the hole through which the sea "came was made by vermin from within the ves- "sel and not by a sword-fish from without—the "seawater did get in."

2429 Neither the case of *Hamilton* v. *Pandorf* nor any other case in England or America that has been mentioned or that we have been able to discover, sustains the proposition that when sea-water damages cargo in a ship's hold and the carrier is unable or unwilling to explain how it got in, he can find any defense in the sea peril clause.

The rule in *The Patria* is not novel. It has frequently been declared in substance, and has never
2430 heretofore been questioned in any American case.

Pacific Coast Co. v. *Bancroft-Whitney Co.*, 94 Fed., 180, 196-201 (C. C. A., Ninth Circuit).
Ins. Co. of N. A. v. *N. German Lloyd Co.*, 106 Fed., 973, 975 (Morris, *J.*).
The Samuel E. Spring, 29 Fed., 397.
Appellant's Brief, p. 56.

2431 *3. Certification to the Supreme Court.*

It will be a severe shock to the average layman to learn that in some cases a litigant may, in the judgment of a majority of the Court, have established a certain state of facts, and that that state of facts, in the opinion likewise of a majority of the Court, may entitle him legally to relief, and yet that the same Court denies him any relief whatever.

This is the present situation.

2432 Your petitioners respectfully represent to the Court that so exceptional a situation may properly appeal to the discretion of the Court to exercise what power it may have in law to permit a further review to be had.

The statute creating this Court expressly provides:

"In every such subject within its appellate jur-
"isdiction, the Circuit Court of Appeals at any
"time may certify to the Supreme Court of the
"United States any questions or propositions of

"law concerning which it desires the instruction 2433
"of that court *for its proper decision.*"

It has been decided by a majority of this Court that the damage was due to the unexplained entrance of seawater. The District Judge, after wavering, finally placed his decision upon the same ground (Opinion, 2339).

This Court has no power to grant any further review by certificate upon any issue of fact. Therefore, it must be regarded as a finality that 2434
the damage was seawater damage.

The theory of our system of jurisprudence is that upon a proper determination of the facts, the Court will apply to these facts the correct rules of law and determine the rights of the parties accordingly.

But this is precisely what has not happened in the present case.

The Judges who have determined the facts are equally divided as to whether upon these facts 2435
there is any remedy or not. Although there must be *some* correct rule of law applicable to the facts determined, your petitioners have been denied the privilege of a declaration of that rule, with the right of taking advantage of the rule, if favorable.

If the case shall stop here, the result will be to permit the Judge, who (as the majority has held) made an erroneous finding of facts, to determine the rights of the parties just as if his findings 2436
had been accepted instead of rejected by the majority.

The language of the statute, it is true, is permissive, but in conferring a power upon this Court, it confers also a responsibility, which it is the duty of this Court to exercise in a proper case.

The statute itself indicates when the power is intended to be exercised: it is when an authoritative declaration of the law from the Supreme

Court is necessary to enable this Court to reach a proper decision.

How can it be said that this Court can reach a proper decision without knowing, for the purpose of the present case, whether the *Patria* rule is the law or not? For, without such knowledge, the established fact that the damage was due to seawater leads to no conclusion as to awarding or withholding a remedy.

True, the Judge who adhered to the sweat hypothesis intimated that he was satisfied of the correctness of the *Patria* rule. But upon his findings of fact, no question of law was presented to him for decision. He was as little able to cast a vote upon the question as was Judge Wallace, who concurred in the *Patria* opinion and has presumably not altered his view.

It matters not that all the other Judges of this Circuit may agree with the *Patria* rule. Nevertheless, so far as a "proper decision" *of the present case* is concerned, this question of law is unsettled and doubtful. The instructions of the Supreme Court are necessary for its proper decision.

The question, it is submitted, is a proper one for the consideration of the Supreme Court on account of the large amount involved (over $25,000); on account of its intrinsic importance; and on account of the rather unsettling effect of certain *dicta* in *Hamilton* v. *Pandorf*. The latter would be of no consequence if the Supreme Court had not, in the *G. R. Booth*, suggested the possibility of distinguishing the English case instead of distinctly disapproving it. See *The Euripides*, 71 Fed., 728, 730.

The question of law that is presented in this case is, whether, in case of a vessel, not shown to be unseaworthy and not shown by affirmative evidence to be in any way in fault, seawater enters, such event shall be regarded as falling within the terms of the sea-peril clause of the bill of lading.

The question really is, whose risk is it, that cargo should be damaged by seawater entering in some way that no human being can explain? Is it the risk of the ship as a common carrier, or is it the risk of the cargo-owner? 2441

This question, it is submitted, is one of fundamental importance in the theory of cargo damage cases, and is a question that is likely to recur from time to time.

It is a question that should be authoritatively settled for the entire country. 2442

The remedy by applying to the Supreme Court for its writ of *certiorari* is extremely uncertain.

In view of the large and increasing mass of business before the Supreme Court, it is a matter of common knowledge that it is almost impracticable for that Court to give such attention to petitions for writs of *certiorari* as will insure the granting of such petitions as set forth causes fairly entitled to be heard in that Court. The mere pressure upon the time of the Judges of that Court has come to be almost a denial of the statutory privilege of a writ of *certiorari*. 2443

In the five years ending April 1, 1907, only 81 petitions for *certiorari* in admiralty cases were presented. There had been a considerable decrease in number owing to the small chance which, experience showed, there was, of obtaining favorable consideration. Of the 81 petitions, only 7 were granted.

It would be eminently advantageous, if this Court, familiar as it is with the issues and questions of the present cause, would take the responsibility of certifying the present question to the Supreme Court. 2444

WHEREFORE, to the end that full and complete justice may be done, your petitioners pray that this Court will be pleased to grant a reargument upon the question of the character of the damage to petitioners' cargo, upon the effect of a finding that the rice was wet with sweat and salt with

2445 kainit, and upon the question of reaffirming in this case the rule in the *Patria* case; and if this Court shall be unwilling to grant a reargument, that it will be pleased to certify to the Supreme Court of the United States the question of law aforesaid for its instructions; and that it will grant such other relief as shall seem meet.

GUSTAVE A. JAHN & Co.

BUTLER, NOTMAN & MYNDERSE,
2446 Proctors for the Petitioners.

STATE OF NEW YORK,
County of New York. } ss.:

FREDERICK M. BROWN, being duly sworn, deposes and says: That he is one of the proctors for the petitioner; that he has read the foregoing petition, and that the same is true to the best of deponent's knowledge, information and belief.

FREDERICK M. BROWN.

2447 Sworn to before me this 8th day of April, 1907.

A. H. STICKLAND,
[NOTARIAL SEAL.] Notary Public,
Kings County.

Certificate filed in New York County.

I, FREDERICK M. BROWN, do hereby certify that I have examined with diligence the foregoing pe-
2448 tition and the record in this cause. I verily believe that the grounds therein assigned for a rehearing and for other relief are well founded in law and in fact, and that the prayer of the petition should be granted.

FREDERICK M. BROWN.

New York, April 8, 1907.

[Endorsed:]—United States Circuit Court of Appeals, Second Circuit.—Filed Apr. 9, 1907, William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, 2449

SECOND CIRCUIT.

GUSTAVE A. JAHN & Co.,
Libellants-Appellants,

vs.

The S. S. "FOLMINA,"
Claimant-Appellee. 2450

ON MOTION FOR RE-ARGUMENT.

On Monday, April 29th, at the opening of court, counsel may be heard briefly in re-argument upon a single point. That is whether, upon the finding of a majority of the court that sea water caused the damage, a statement of facts can be prepared which both sides will approve and upon which there may be certified to the Supreme Court the question whether the rule stated by this court in the case of *The Patria*, 132 F. R., 971, as to burden of proof should be applied in the disposition of the cause. 2451

[Endorsed:]—United States Circuit Court of Appeals, Second Circuit.—Jahn *v. Folmina*.—Memo.—United States Circuit Court of Appeals, Second Circuit.—Filed Apr. 16, 1907, William Parkin, Clerk. 2452

2453 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit held at the Court Rooms in the Post Office Building, City of New York, on the 26th day of April, 1907.

Present—Hon. E. Henry Lacombe,
Hon. William K. Townsend,
Hon. Alfred C. Coxe,
2454 Judges.

Gustave A. Jahn and another,
Libellants-Appellants,

vs.

S. S. "Folmina," her engines, etc.,
William Van Eyken,
2455 Claimant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof it is

Ordered that the mandate heretofore issued herein be recalled and that the order entered on the 5th day of April, 1907, be and hereby is va-
2456 cated and set aside.

It is further ordered that a re-argument be had in accordance with the decision filed April 16th, 1907.

E. H. L.

[Endorsed:]—United States Circuit Court of Appeals.—Second Circuit.—G. A. Jahn *v.* S. S. *Folmina.*—Order.—United States Circuit Court of Appeals.—Second Circuit.—Filed Apr. 26, 1907.—William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS. 2457

SECOND CIRCUIT.

Before LACOMBE, TOWNSEND and COXE,
Circuit Judges.

GUSTAVE A. JAHN and another,
Libellants-Appellants, 2458

vs.

S. S. "FOLMINA,"
WILLIAM VAN EYKEN,
Claimant-Appellee.

This cause came here upon appeal from a decree of the district court, Eastern District of New 2459
York, dismissing a libel. Upon the hearing of the appeal questions or propositions of law arose, concerning which this Court desires the instruction of the Supreme Court for its proper decision.

STATEMENT OF FACTS.

The facts upon which the questions arise are as follows:

The S. S. *Folmina* sailed from Kobe, Japan, for New York with a large shipment of rice on 2460
board, in No. 3 hold, under a bill of lading which exempted the carrier from "The act of God * * * loss or damage from * * * explosion, heat, or fire on board * * * risk of craft or hulk or trans-shipment and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind." It further provided that the ship "is not liable for * * * sweat, rust, decay, vermin, rain spray."

2461 The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

2462 A majority of the court are satisfied that the damage was caused by sea water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

2463 The *Folmina* was a steel steamship of the highest class in Lloyd's Register. Before starting for Japan she was in drydock at New York and was there surveyed by Lloyd's surveyor. Some time before she had been in drydock at Cardiff, where some repairs were made to the rudder, rudder-quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

2464 During and after the delivery of the cargo, the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libelants and their underwriters and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side-plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea water,—if that be considered evidence) was found that there had been leaks in any part of the frame, structure,

side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea water were found, nor any defect in the steamer which then appeared to be seaworthy. 2465

QUESTION CERTIFIED.

Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are: 2466

1. "Whether damage to the cargo of an apparently seaworthy ship through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of the bill of lading exception above quoted?

2. Whether the ship is relieved from liability in consequence of said exception?"

In accordance with the provisions of Sec. 6 of the Act of March 31, 1891, establishing Courts of Appeal, the foregoing question of law is by the Circuit Court of Appeals of the United States for the Second Circuit, hereby certified to the Supreme Court. 2467

New York, May 7, 1907.

E. HENRY LACOMBE,
Circuit Judge.
WM. K. TOWNSEND,
Circuit Judge. 2468
ALFRED C. COXE.
Circuit Judge.

[Endorsed:]—United States Circuit Court of Appeals, Second Circuit.—Gustave A. Jahn and ano., Libelants-Appellants, *v.* S. S. *Folmina*, William Van Eyken, Claimant-Appellee.—(Copy).—Certificate.—Original forwarded, May 7, 1907.—United States Circuit Court of Appeals, Second Circuit.—Filed May 7, 1907, William Parkin, Clerk.

617

2469

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages Numbered from to 1 to 618 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of Gustave A. Jahn and another, Libellants-Appellants *v.* the

2470 steamship *Folmina*, William Van Eyken, Claimant-Appellee, as the same remain of record and on file in my office, together with the certificate for instructions to the United States Supreme Court.

In Testimony whereof I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this

2471 day of January, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the said United States the One hundred and thirty-second.

WILLIAM PARKIN,
Clerk.

2472

Office Supreme Court, U.
FILED.
MAR 2 1908
JAMES H. McKENNEY
CLERK

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84.

No. ~~319~~.

Supreme Court of the United States.

THE STEAMSHIP "FOLMINA,"
WILLIAM VAN EYKEN,
Claimant-Petitioner,

AGAINST

GUSTAVE A. JAHN and WILLIAM J. GRIFFITHS, composing the firm of GUSTAVE A. JAHN & Co.,
Libellants-Respondents.

October Term, 1907.

Reported below 143 Fed. Rep., 636; 153 Fed. Rep., 364.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

The action in this case was instituted in the District Court of the United States for the Eastern District of New York by Gustave A. Jahn & Co. against the steamer *Folmina, in rem*, to recover $20,000 damages, sustained by a cargo of rice owned by the libellants and carried on board the steamer *Folmina*.

The severe injury of the rice while carried in No. 3 hold of the *Folmina* was never seriously denied, and except in the formal allegations of the answer, has been fully admitted throughout the litigation.

The defense of the steamer has heretofore been twofold:

(1) That the damage complained of was sweat damage in respect of which an appropriate exception, contained in the bill of lading under which the rice was shipped, affords to the steamer a perfect protection; and

(2) That if the damage was due to seawater damage (as libellants alleged and offered strongly preponderating evidence to prove), and even though it occurred in good weather and was wholly unexplained, it must be regarded as covered by the "sea peril" exception of the bill of lading, owing to the *prima facie* evidence of the steamer's seaworthiness offered by the claimant and not successfully rebutted by the libellants' testimony.

The steamer has also relied upon the "sea peril" exemption contained in the third section of the Harter Act; but only as affording protection to the steamer identical in scope and character with that afforded by the exception of the bill of lading. In this court, for the first time, an attempt is made by the steamer to distinguish between the scope of the bill of lading exception and that of the Harter Act exemption; attributing to the latter a broader application than to the former.

The testimony before Judge Thomas in the Eastern District of New York was extremely voluminous and was under consideration by him for an unusual length of time (fol. 4). He finally made a decision dismissing the libel, but he expressly refused to find whether the damage was sweat damage or seawater damage (Opinion, fol. 2335). How this result could be reached, under the hypothesis of seawater damage as well as of sweat damage, was not clearly stated. But he seems to have supposed that the bill of lading "expressly" exempted the ship from liability for damage from sea water (fols. 2332, 2333, 2339); thus making available the doctrine in *Clark* v. *Barnwell*, 12 How., 282. That the de-

cision of the District Judge was founded upon this supposition was the explanation of the Circuit Court of Appeals (fols. 2373, 2375, 2377).

Yet the bill of lading, in fact, contained no exception of the character supposed, but only a "sea peril" clause in the usual form (fol. 2460).

Upon appeal to the Circuit Court of Appeals, conflicting conclusions were reached by the three judges of that court. A majority of the judges was of the opinion that the damage was seawater damage; a majority of the judges was also of the opinion that, as a matter of law, the steamer was not entitled to shield herself from liability as for damage due to a "sea peril," because the evidence did not show any weather of such severity as would account for the presence of sea water in a seaworthy ship.

It might be inferred from this statement that the Circuit Court of Appeals would have entered a judgment of reversal, with directions to the District Court to award to the libellants their damages with interest and costs. But it so happened that one of the judges who sustained the libellants' contention that the damage was seawater damage considered that (notwithstanding the absence of any storm or other known casualty) it was also "sea peril" damage for which the steamer was not liable; and another of the judges who, as a matter of law, sustained libellants' contention that unexplained seawater damage is not "sea peril" damage, was, nevertheless of the opinion that the question of law referred to was not presented for decision upon the facts of this case, believing that the damage was sweat damage.

The Circuit Court of Appeals was therefore inclined, at first, to direct an affirmance of the decision of Judge Thomas, but upon application made by the libellants, it certified to this Court for its decision the question whether an apparently seaworthy ship is entitled to

exemption from liability under the "sea peril" exception, in respect of unexplained seawater damage to cargo.

The steamer now petitions this court to require the entire record to be sent to it substantially for the sole purpose (as will presently appear) of passing upon a pure issue of fact, to wit, whether the damage was seawater damage or sweat damage. This is an issue about which the evidence is extremely voluminous and conflicting; an issue not decided by Judge Thomas, but decided favorably to the cargo owners by a majority of the judges of the Circuit Court of Appeals, as appears from its opinion and from the findings of fact presented to this court as a basis for the question certified by the Circuit Court of Appeals (fols. 2382, 2383, 2462).

Two other grounds for invoking the assistance of this Court are in form included in the petition, but they are wholly without substance. These are: (1) That the Circuit Court of Appeals failed to make any finding as to the actual seaworthiness of the *Folmina* but only as to her apparent seaworthiness; and (2) That the Circuit Court of Appeals failed to propound to this court a further question of law as to whether the exemptions from liability in respect of sea perils contained in the third section of the Harter Act would not be operative to exonerate the *Folmina*, even if the bill of lading "sea peril" exception did not do so.

I.

THE FINDINGS OF THE CIRCUIT COURT OF APPEALS IN RESPECT OF THE SEAWORTHINESS OF THE "FOLMINA" WERE AS FULL AND EXPLICIT AS THE EVIDENCE JUSTIFIES.

Ships are built to carry cargoes in safety and to protect them from contact with sea water.

It must be conceded that where a shipowner has not only used due diligence to make his ship seaworthy, but has succeeded in making her absolutely so and has stowed her cargo properly, sea water cannot enter such a vessel and reach cargo unless owing to the violent action of the elements or some other casualty or owing to some fault or error in navigation or management.

But absolute seaworthiness is something that all possible care and diligence may sometimes fail to secure; it is something the lack of which the most scrupulous examination may sometimes fail to disclose.

The Edwin I. Morrison, 153 U. S., 199, 210.
The Carib Prince, 170 U. S., 655.

It does not follow that because damage due to unseaworthiness may have become apparent, the defect constituting unseaworthiness must also become apparent. It may still remain latent and undiscoverable.

While the discovery of defects may establish unseaworthiness, an unsuccessful attempt to discover defects cannot establish seaworthiness. The latter can only be inferred, for the purpose of judicial decision, from the circumstances of each case.

Steele v. *State Line S. S. Co.*, 3 App. Cas., 72.

If the cargo damage complained of were of a character specifically excepted in the bill of lading, the cargo owner, in order to recover, must bear the burden of establishing, as the cause of the damage, unseaworthiness of the vessel or some negligence furnishing legal ground of liability. In this event, if no defect of the vessel were discovered and proved, the court would be justified in inferring for the purpose of the case that the vessel was seaworthy.

The real question, therefore, which the certificate

already presents to this court is whether, considering the burden of proof imposed upon the respective parties under a contract of this character, (1) it ought to be inferred, from the libellants' failure to discover any defect in the *Folmina*, that she was seaworthy, and that sea water entered because of the violent action of the elements or some other cause for which the steamer is not liable, or whether (2) it ought to be inferred that the *Folmina* was unseaworthy because of the steamer's failure to explain how the sea water entered, or to show that its entrance was due to a storm, to some act or occurrence mentioned in the third section of the Harter Act or to some cause not constituting a ground of liability on the part of the steamer.

All the material facts and circumstances bearing upon the seaworthiness of the *Folmina* are fairly and accurately set forth in the certificate already made by the Circuit Court of Appeals in this case (fols. 2463-2465).

That court could not have gone further (as petitioner now contends it should have done) and found either that the *Folmina* was seaworthy, or that sea water entered owing to her unseaworthiness, without deciding in effect the legal question which the Court of Appeals has reserved for decision by this court.

Once a finding of actual seaworthiness (as distinguished from apparent seaworthiness and from due diligence to make seaworthy) in favor of the *Folmina* can be made, the exculpation of the steamer follows as of course.

There was no need to make any finding as to whether there had been due diligence to make the *Folmina* seaworthy for two reasons.

1. No fault or error in the navigation or management of the *Folmina* is established by the record (Van Eyken, fols. 1897-1898; Certificate, fol. 2462).

It was therefore unnecessary to consider what would have been legal consequence of such faults or errors under the third section of the Harter Act.

2. There was in this case unrestricted liability on the part of the *Folmina* for damage due to the slightest defect constituting unseaworthiness, whether or not due diligence had been exercised in the premises. For, just as in the case of the *Carib Prince*, 170 U. S., 655 ,the owner of the *Folmina* had not taken advantage of the privilege that the Harter Act affords, of contracting in the bill of lading against his obligation of absolute seaworthiness and of substituting due diligence to make seaworthy in lieu thereof.

The evidence presented by the record tending to establish the seaworthiness of the *Folmina* during the voyage in question, shows, no doubt, that the steamer was in fairly good condition; but it falls far short of establishing seaworthiness in every detail. The statements on this subject made by the District Judge and now quoted in the petition (pp. 9 and 10), are unjustifiably sweeping and have not received the approval of the Circuit Court of Appeals.

The evidence presented on this subject will not bear an interpretation more favorable to the ship than that which the latter court, after hearing both parties upon the original arguments and upon the rearguments, has put upon it in its certificate to this court (Record, fols. 2463, 2464, 2465).

Certain facts relating to seaworthiness are relied upon by the petitioner as established by "the evidence of competent witnesses who were not impeached or contradicted" (Petiiton, p. 10). The contention thus made by petitioner will not bear analysis. We shall reply seriatim as briefly as possible, indicating the subdivisions by the same letters that are used by petitioner:

(a.) From the time the steamer had been launched up to the time of the injury to the libellants' rice, there

had been no general overhauling; only certain trifling repairs of broken parts (Van Eyken, fols. 1598–1609). And yet the steamer had been carrying extraordinarily heavy cargoes calculated to put upon her the greatest possible strain.

She had carried coal from Blythe, England, to Alexandria (Van Eyken, fol. 1575); a full cargo of manganese ore from Poti, on the Black Sea, to Baltimore (1575); heavy krome ores and coal from Australia to St. Lazarre, France (1580); phosphate rock and resin from Fernandina, Florida, to Hamburg, kainite ore from Hamburg to Port Royal and Charleston (1589); iron ore and machinery from New York to Japan (1610).

Long voyages with such cargoes were calculated to strain the ship and make her leaky and otherwise defective, especially if the voyages were prosecuted in heavy weather. To some extent the captain of the *Folmina* admits that they were (Van Eyken, 1576). But in order to show just how rough these voyages were, the logbooks of the steamer for the voyages in question were called for at the time of the examination of the captain, the 30 July 1901 and the 1 August 1901 (fols. 1579, 1584, 1588, 1647). The last of the depositions in the case was not taken until the 5 May 1903, nearly two years later, and yet the logbooks called for by the shippers were never produced.

It does not appear from the passages cited by the petitioner, or elsewhere in the record, that there had been any thorough examination of the steamer in Cardiff, or in New York or elsewhere, for two years before the disaster.

At Cardiff no examination whatever of the steamer, apparently, was made, although slight repairs were effected.

At New York, on the other hand, it appears that the vessel was surveyed by Lloyd's Surveyor before beginning the voyage next preceding that on which the injury occurred. But petitioner has not offered evidence to show whether the condition of the ship

as disclosed by the survey at that time was good, bad or indifferent.

(c.) The only evidence that at the inception of the voyage in question, due diligence to make the ship seaworthy had been exercised, is a vague, general, self-exculpatory statement of the master of the vessel (Van Eyken, fol. 1491), which, indeed, may not be broader in meaning than that the holds had been properly cleaned.

(d.) In a voyage lasting from February 4th to May 9th, some bad weather would always be encountered. But the weather on the voyage in question was of the usual character. The captain's testimony was that the voyage was an ordinary one of such character in respect of the weather as was to be expected (Van Eyken, fol. 1800). The chief officer testified that most of the voyage they had good weather; sometimes a little rough, and that no damage was done to the ship by the sea (Carst, fols. 1158, 1159). The second officer testified that he knew of no injury to anything on board the ship from any storm (De Boer, fol. 1449). Another witness said the voyage was not stormy, not a little bit; and when asked whether it was a pleasanter voyage than usual, said:

> "Oh, yes, it was all right. It was pleas-
> "ant. It was good weather. A little bit of
> "wind sometimes; a little bit of sea, too"
> (Everts, fols. 1296, 1297).

(e.) Soundings of the holds were doubtless taken daily; but whether they showed much water, little water or none, is not established by any competent evidence. The carpenter who always took these soundings, was not called as a witness; his absence from the witness stand was not explained.

(f.) Three watches were kept in the engine room; one engineer in charge of each. Two out of the

three engineers have not been called as witnesses. There is no evidence to show how much pumping was done during 16 out of 24 hours of each dey.

(g.) While the ship's servants did not know, or affected not to know, that sea water entered through the hatches, decks or ventilators of the ship or, in fact, any other part of the ship, the evidence was decisive that sea water entered somewhere. None of the witnesses, in the nature of things, was in a position to testify absolutely that no water could have entered through hatches, decks, ventilators, side plating or elsewhere.

(h.) The testimony of the ship's servants that there had been no leak in or around the scupper pipe of No. 3 hold, was seriously impeached by the fact that between the vertical starboard scupper pipe, that passed entirely through No. 3 hold from top to bottom, and the wooden casing by which it it was enclosed, there was found in New York at the time the cargo damage was discovered, a sopping, dripping mass of debris, which could not have got there by any sweat hvpothesis (Salter, fols. 401, 402, 404; Davies, fol. 62). The presence of this wet mass in the scupper pipe casing would be accounted for by an imperfect joint between the upper extremity of the pipe and the 'tween decks, provided there had been water present on the 'tween decks. The imprefection, it is true, did not exist at the time when libellants' surveyors made their examination at the end of the voyage in question. Nevertheless, the imperfection may have been cured without leaving evidence of its existence, by simply screwing down the collar at the joint (fols. 82, 1012, 1560); or the break, if one existed, may have been repaired by cement, all trace of such repair disappearing within one day (Davies, fols. 86, 87; Herbert, fol. 1012). This repair would naturally have been within the scope of the chief engineer's duties. The chief engineer was not called as a witness.

(1.) Sea water in the between decks would not leave evidence of its presence at the end of the voyage through cargo damage, for the cargo in the forward end of No. 3 between decks, where its level was lowest and where the scupper pipe was located, consisted of case goods, porcelain, etc. (fols. 1493, 1345), which would not be injured by sea water. There may have been sea water in the between decks for cleansing purposes (fols. 1261, 1491), or sea water may have come through the ventilators before they were closed (fol. 1505); or through the open hatchways (fols. 1726, 1738).

A very misleading use has been made by petitioner of certain statements contained in libellants' petition for reargument before the Circuit Court of Appeals (Petition, pp. 14, 15, 19).

Libellants have maintained throughout every court in briefs and arguments, and still maintain in this court, that the cargo damage was seawater damage; that the ship's evidence of seaworthiness was vague and unsatisfactory and that the unexplained presence of sea water in the hold of the ship after a voyage of ordinary smoothness (*Hubert* v. *Recknagel*, 13 Fed. Rep., 912), must legally be attributed to the unseaworthiness of the steamer.

The Zone, 2 Sprague, 19.
The Centennial, 7 Fed. Rep., 601.
The Samuel E. Spring, 29 Fed. Rep., 397.
The Lydian Monarch, 23 Fed. Rep., 298.
The Patria, 132 Fed. Rep., 971.

Libellants' counsel have always believed that the master and chief engineer of the *Folmina* could, if they would, explain how the sea water entered her hold. But even though the steamer had done everything that is possible for human diligence to accomplish in throwing light on the

question of the method of entrance of sea water into the hold of the *Folmina*, still the explanation being insufficient, the steamer must remain liable under fundamental principles of law. This was the proposition which, in the form of a question, was submitted to the Circuit Court of Appeals, and which libellants asked that court to certify to this court (fols. 2440, 2441).

This meaning of libellants' counsel, which seems moderately apparent from the context, has been grossly distorted in the petition (pp. 14, 15, 19).

II.

No question under the Harter Act can possibly arise.

The Harter Act is not invoked by the steamer as a defense against faults or errors in navigation or management, but purely in respect of its "sea peril" exemption.

The act relieves shipowners from liability for "losses arising from dangers of the sea" on condition that due diligence shall have been exercised to make the ship seaworthy. The bill of lading in this case relieves the *Folmina* from liability for like losses (expressed in identical language, fols. 2301, 2460), but without condition.

If there is exemption under the Harter Act, there must necessarily be exemption under the bill of lading.

Petitioner asks this Court to issue its writ of *certiorari* to enable the application of the Harter Act to be considered, upon the plea that its exemptions, in respect of sea perils, are broader than those of the bill of lading. This plea is founded upon the as-

sumption that it is a condition precedent to invoking any bill of lading exception, that the ship must be absolutely seaworthy (*Petition*, pp. 8, 15, 17), whereas the third section of the Harter Act may be invoked, if due diligence to make seaworthy has been exercised.

The assumption is without foundation in principle or precedent.

A shipowner may, by suitable exceptions, in his bill of lading exempt himself from liability for certain classes of losses or for losses due to certain causes, provided that his liability for the consequences of his own negligence cannot be avoided by any contractual stipulations. But no negligence or want of seaworthiness defeats his exemption if it had no causal connection with the loss.

The cases relied on by petitioner do not support his view.

In *The Caledonia*, 157 U. S., 124, 132, 136, the rule of law, implied in the following questions propounded by Lord Blackburn to a jury, is evidently approved: "Was the vessel at the time of her sail-"ing in a state * * * reasonably fit to en-"counter the ordinary perils that might be expected "on a voyage at that season from Hull to Cron-"stadt? Second, If she was not in a fit state, *was* "*the loss* that happened *caused by that unfitness?*"

And subsequently, in the same opinion, this Court says:

"In our judgment, the Circuit Court rightly held * * * that the *Caledonia* was unseaworthy when she left port; *and that that was the cause of the damage to libellants' cattle.*"

Carver says: "The shipowner remains responsible for the loss or damage to the goods however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and *if the loss would not have arisen but for that unseaworthiness.*" Carriage by Sea, Sec. 17.

It is therefore plain that the Harter Act affords no greater protection to the ship in this case than the bill of lading. It is also evident that the petitioner is in error (Petition, pp. 8, 19) in supposing that the two Judges of the Circuit Court of Appeals who were inclined to exonerate the *Folmina* under the "sweat" and the "sea peril" exceptions of the bill of lading, respectively, must have made any finding as to the seaworthiness of the steamer.

III.

THE ISSUE OF FACT AS TO WHETHER THE DAMAGE WAS DUE TO SWEAT OR SEA WATER DOES NOT REQUIRE THE INTERPOSITION OF THIS COURT.

This Court has not ordinarily issued its writ of *certiorari* simply to review issues of fact.

The issue in question is presented in a record comprising 560 printed pages of testimony, all of which, practically, relates to this issue. More than 100 pages of the briefs of counsel before the Circuit Court of Appeals were devoted to this issue.

The evidence that the damage was due to sea water preponderated overwhelmingly. It was only because of the difficulty of explaining the presence of sea water in the hold of the steamer that the sweat theory was made to seem tenable.

The damage in question was almost entirely on the starboard side of the ship (McCarroll, fol. 2199; Koehler, 526, 530, 515; Carst, 1223; Van Valkenburgh, 2136, 2137; Tiffany, 2040); sweat would be almost equally distributed on the two sides (Tiffany, fol. 2092; Gould, 247, 248; Putnam, 156, 157).

Sweat would attack the upper tiers of rice bags, instead of the middle and lower tiers, as on the *Folmina* (Putnam, fol. 148; Koehler, 548, 606; Gould, 244, 243; Miller, 2024; Van Valkenburgh, 2146, 2162, 2163; De Baer, 1387, 1388; Tiffany, 2050).

Sweat would be confined to the outer rows of bags, instead of extending three or four rows inboard, as this damage did (Miller, fol. 1992; Putnam, 156, 147; Koehler, 525, 539, 546).

Sweat is never concentrated in a single focus or pocket, as this damage was (Van Valkenburgh, fol. 2109).

If the damage was due to sweat, evidences of sweat should have been found in the between-decks and in the other holds (Putnam, 149; Koehler, 553; Van Eyken, 1645, 1662).

The actual damage also differed from sweat damage in severity, caking, odor and color, as numerous witnesses have testified.

Most convincing of all, however, was the fact that careful chemical analysis revealed sea salt in large quantities in all the samples. One sample showed as much salt, within 10 per cent., as sound rice would absorb by an immersion for twenty-four hours in sea water (Thomas, fols. 621, 631; Newlands, 2295).

The two leading chemists who made the analyses, both men of large experience in such cases, gave positive opinions that the damage was due to sea water (Thomas, 623; Newlands, 2296), and no expert was called who disagreed with them.

There is not the slightest foundation in the testimony upon which any other explanation of the salt found in the rice than that it was due to contact with sea water. Not a question was put to any of the chemical experts as to the nature or composition of kainit (a former cargo of the *Folmina*), or as to the possibility of its adhering to the sides of the

ship, or as to whether an admixture of kainit would explain the salt found in the damaged rice.

But now petitioner is asking this Court to go entirely outside of the record and without the assistance of experts, study up for itself from works on chemistry the nature of kainit for the purpose of investigating the possibility that an admixture of kainit might explain the saline constituents of the damaged rice. Petitioner apparently hopes that sufficient doubt may thus be created to induce this Court to issue its writ of *certiorari* to review the findings of fact of the Circuit Court of Appeals.

We shall not imitate petitioner's example by making an argument founded on matters entirely outside the record. We may add, however, that from our investigations kainit apparently differs greatly in composition, according to the locality from which it comes. Much of it, and, in fact, all *pure* kainit is without common salt (sodium chloride) at all in its composition, but has only potassium chloride in addition to magnesium sulphate. See Webster's Dictionary. Its chemical formula is $H_6\,KM_g\,SO_7\,Cl$. Pure kainit, therefore, could not account for the sodium chloride that was found (Newlands, 2295, 704; Thomas, 622; Putnam, 175).

There is no information in the record as to the composition of the particular kainit that had been carried by the *Folmina* or the locality from which it came, except that it was laden at Hamburg. There is no reason to suppose that any of it still remained in the ship when the libellants' rice was taken on board. The inference from the record is quite the reverse (Van Eyken, fols. 1591, 1488, 1489, 1491).

It seems unnecessary at this time to consider what would be the legal consequence if libellants' rice was, in fact, damaged by sweat and kainit combined. The question is briefly referred to in libellants' petition to the Circuit Court of Appeals (fols. 2400-2418).

IV.

NO SUFFICIENT CAUSE FOR THE ISSUANCE OF A WRIT OF CERTIORARI HAVING BEEN SHOWN BY THE PETITION, THE LATTER SHOULD BE DENIED.

WALLACE, BUTLER & BROWN,
Proctors for Libellants-Respondents.

FREDERICK M. BROWN,
Of Counsel.

THE FOLMINA.[1]

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 84. Argued January 21, 22, 1909.—Decided February 23, 1909.

When goods which were received in good order on board a vessel under a bill of lading agreeing to deliver them, at termination of the voyage, in like good order and condition are damaged on the voyage, the burden is on the carrier to show that the damage was occasioned by a peril for which he was not responsible. *Clark* v. *Barnwell*, 12 How. 272.

Merely proving that damage to cargo was by sea water does not establish that such damage was caused by peril of the sea within the exception of the bill of lading; in such a case conjecture cannot take the place of proof. *The G. R. Booth*, 171 U. S. 450.

Where a certified question does not propound a distinct issue of law,

[1] Docket title, No. 84, Jahn *v.* Steamship Folmina, Van Eyken, Claimant.

but in effect calls for a decision of the whole case, this court need not, and in this case does not, answer it. *Chicago, B. & Q. R. R.* v. *Williams*, 205 U. S. 444.

The question "whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from the act of God . . . loss or damage from . . . explosion, heat or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature and kind" answered in the negative.

The question "whether the ship is relieved from liability in consequence of said exception," not presenting a distinct issue of law, not answered.

THE facts are stated in the opinion.

Mr. Frederick M. Brown for Jahn *et al.*:

The questions submitted to this court for answer in this cause are favorably controlled by *The G. R. Booth*, 171 U. S. 450. The only differences between the facts in that case and the facts in the instant case are differences which make the owner of cargo on the Folmina more clearly entitled to redress than the owners of the cargo of the Booth. In the *Booth case* the carrier fully explained the entrance of the sea water; in the present case the carrier either cannot or will not explain how the sea water entered. In the *Booth case* the Circuit Court of Appeals certified as a fact that the steamer was actually seaworthy; in the present case it merely certified that there was an appearance of seaworthiness and that competent surveyors could not discover any defect. In the *Booth case* the facts certified by the Circuit Court of Appeals excluded the hypothesis of negligence on the part of the carrier or his crew; in the present case the Circuit Court of Appeals has only certified that the record contains no evidence showing negligence or fault on the part of the Folmina's crew.

No other point of difference between the two cases has been discovered.

It is just as certain in the case of the Folmina as in the case

of the Booth that there must have been an efficient agency or cause, permitting the sea water to enter. So long as that efficient cause remains undisclosed, the courts cannot know whether the damage comes within the scope of the sea peril exception or not. As it is the obligation of the carrier, upon fundamental principles, to bring the case within some contractual exception or statutory exemption from liability in order to exonerate himself, it follows that the Folmina must be liable, and the questions certified must be answered in the negative. See also *The Thrunscoe* (1897), Prob. 301.

Carriers should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration. See *The Mohler*, 21 Wall. 230, 233; *Propeller Niagara* v. *Cordes*, 21 How. 7, 25; *The Caledonia*, 157 U. S. 124, 144; *Forward* v. *Pittard* (1785), 1 Durnford & East, 27; *The Edwin I. Morrison*, 153 U. S. 214; *The Mascot*, 48 Fed. Rep. 119; *S. C.*, 51 Fed. Rep. 605.

Once the carrier is able to show with the requisite degree of clearness that the damage is of an excepted character, the prevailing rule is that he need go no further to establish affirmatively that he was free from negligence in the premises; the shipper in this event having the burden of proving negligence. *Clark* v. *Barnwell*, 12 How. 272.

Nevertheless, there is a very respectable body of authority to the effect that even in this case it is contrary to public policy to impose upon the cargo owner a burden of proof which he is, from his inherent position, so ill adapted to bear. *Pittsburg &c. R. Co.* v. *Racer*, 5 Ind. App. 209; *Tardos* v. *Toulon*, 14 La. Ann. 429; *J. Russell Mfg. Co.* v. *New Haven Steamboat Co.*, 50 N. Y. 121; *Mitchell* v. *Carolina Cent. R. Co.*, 124 N. C. 236, *Pennsylvania R. Co.* v. *Miller*, 87 Pa. St. 395; *Johnstone* v. *Richmond &c. R. Co.*, 39 S. C. 55; *Alabama Gt. Southern R. Co.* v. *Little*, 71 Alabama, 611; *Central &c. Co.* v. *Hasselkus*, 91 Georgia, 382; *Adams Express Co.* v. *Stettaners*, 61 Illinois, 184; *Louisville &c. R. Co.* v. *Thompson*, 13 Ky. L. Rep. 973; *Mahon* v. *Steamer Olive Branch*, 18 La. Ann. 107; *Hinton* v. *Eastern R.*

Co., 72 Minnesota, 337; *Southern Express Co.* v. *Seide*, 67 Mississippi, 609; *Crow* v. *Chicago &c. R. Co.*, 57 Mo. App. 135; *Union Express Co.* v. *Graham*, 26 Ohio St. 595; *Turney* v. *Wilson*, 7 Yerg. (Tenn.) 339; *Brown* v. *Adams Express Co.*, 15 W. Va. 812; *Kirst* v. *Milwaukee &c. R. Co.*, 46 Wisconsin, 489; *Texas &c. R. Co.* v. *Richmond*, 94 Texas, 571.

Unexplained sea water damage to cargo is not of itself a sea peril, however seaworthy the vessel may appear. *The Reeside*, 2 Sumner, 567; *S. C.*, Fed. Cas. No. 11,657; *The Warren Adams*, 74 Fed. Rep. 413, 415; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Henry B. Hyde*, 90 Fed. Rep. 114, 116; *The Lennox*, 90 Fed. Rep. 308, 309; *The Patria*, 132 Fed. Rep. 971, 972; *The Svend*, 1 Fed. Rep. 54; *Bearse* v. *Ropes*, 1 Sprague, 331; *S. C.*, Fed. Cas. No. 1192; *The Zone*, 2 Sprague, 19; *S. C.*, Fed. Cas. No. 18,220; *The Queen*, 78 Fed. Rep. 155, 165, 168; affirmed 94 Fed. Rep. 180, 196; *The Centennial*, 7 Fed. Rep. 601; *The Lydian Monarch*, 23 Fed. Rep. 298; *The Compta*, 4 Sawyer, 375. To the same effect: *The Sloga*, 10 Ben. 315; *S. C.*, Fed. Cas. 12,955; *The Phœnicia*, 90 Fed. Rep. 116, 119; *S. C.*, 99 Fed. Rep. 1005; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Presque Isle*, 140 Fed. Rep. 202, 205.

The only inference properly drawn from the facts certified is that sea water entered the Folmina, not owing to any sea peril, but owing to the steamer's latent unseaworthiness or owing to some undiscovered internal mishap similar to that which occurred in the *Booth case* owing to some other cause for which the steamer is liable.

The carrier having the burden of explanation, the legal inference from failure to explain is that sea water found entrance to the hold of the Folmina owing to some cause for which the carrier is legally liable. *Nelson* v. *Woodruff*, 1 Black, 156, 160; *The Warren Adams*, 74 Fed. Rep. 413, 414.

Mr. J. Parker Kirlin, with whom *Mr. John M. Woolsey* and *Mr. Charles R. Hickox* were on the brief, for the Folmina:

The questions certified are predicated on the assumption

that the steamship was seaworthy and that the damage to the cargo occurred without the fault of the master, officers or crew. The language of the certificate is conclusive on the above point. See also *The Folmina*, 143 Fed. Rep. 636.

The damage to cargo found to have been caused by the entrance of sea water into a seaworthy ship, without the ship's fault, is "a loss by a danger or accident of the sea or of navigation," within the meaning of the exception, even though it cannot be determined, under the special circumstances, just how the water got in. *Montoya et al.* v. *London Assurance Co.* (1851), 6 Exch. 451; *S. C.*, 86 R. & R. 364; *Clark* v. *Barnwell*, 12 How. 272; *The Viscount*, 11 Fed. Rep. 169; *The Majestic*, 166 U. S. 375, 386; *Patrick* v. *Hallett*, 1 Johns. 241; *Starbuck* v. *The Phœnix Insurance Co.*, 62 N. Y. Supp. 264; *Potter* v. *Ins. Co.*, 2 Sumner, 197; *Bullard* v. *The Roger Williams Ins. Co.*, 1 Curtis, 148; *Hooper* v. *Rathbone*, Taney, 519. See also *Hibernia Insurance Co.* v. *St. Louis Transportation Co.*, 120 U. S. 166, and *The G. R. Booth*, 171 U. S. 450; *The Xantho*, 12 App. Cas. 503; *Hamilton* v. *Pandorff*, 16 Q. B. D. 633; *S. C.*, 12 App. Cas. 518; *Blackburn* v. *Liverpool, Brazil & River Plate St. Nav. Co.* (1902), 1 K. B. 290; *The Southgate* (1893), Prob. 329; *The Cressington* (1891), Prob. 152; *The Glendarroch* (1894), Prob. 226; *The Exe*, 57 Fed. Rep. 886; *The Castleventry*, 69 Fed. Rep. 475, note; *Davidson* v. *Bernand*, L. R. 4 C. P. 117, 122; *Thames & Mersey Marine Ins. Co.* v. *Hamilton*, 12 App. Cas. 492; *The Ontario*, 37 Fed. Rep. 220, 225.

The true intent and purpose of the rule which ordinarily requires the carrier to give an explanation of damage to cargo, is to require him to furnish such information as he may possess, with regard to it, in order that the court may be satisfied that the loss has not resulted from his negligence or from the unseaworthiness of the ship.

Where, as in this case, it is found that a cargo damage has been caused by the entrance of sea water into the ship, during the voyage, without the negligence of the ship's officers or crew, and that the ship was seaworthy for the voyage, a *prima facie*

case of a loss by "a danger or accident of the seas or of navigation" is made out, and the reason of the rule is satisfied, even though in the special circumstances, neither the carrier nor the most expert of surveyors could determine how the water got in the ship.

In the absence of any allegation of unseaworthiness by the shipper, or of any attempted proof of it, or of fault on the ship's part, the loss should be considered to be within the exception.

MR. JUSTICE WHITE delivered the opinion of the court.

Upon the hearing of an appeal from a decree of the District Court, Eastern District of New York, dismissing a libel, the Circuit Court of Appeals for the Second Circuit certified to this court for decision, pursuant to § 6 of the judiciary act of 1891, the following questions:

1. Whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from "The act of God . . . loss or damage from . . . explosion, heat, or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers and canals and of navigation of whatever nature or kind."

2. Whether the ship is relieved from liability in consequence of said exception?

The facts upon which the questions arose were thus stated in the certificate:

The steamship Folmina sailed from Kobe, Japan, for New York with a large shipment of rice on board in No. 3 hold, under a bill of lading which contained the exception set out in the first of the foregoing questions, and also a provision that the ship "is not liable for sweat, rust, decay, vermin, rain or spray."

The rice was in good order when put on board, but when discharged in New York a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

A majority of the court are satisfied that the damage was caused by sea water and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The Folmina was a steel steamship of the highest class in Lloyd's register. Before starting for Japan she was in dry dock at New York and was there surveyed by Lloyd's surveyor. Some time before she had been in dry dock at Cardiff, where some repairs were made to the rudder, rudder quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo the main deck, the between deck, the pipes leading to or connected with No. 3 hold and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libellants and their underwriters, and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side plating and rivets of the ship were found to be sound, intact and free from leaks. No evidence (other than the mere circumstance that the damage was by sea water, if that be considered evidence) was found that there had been leaks in part of the frame, structure, side plating, riveting, pipes or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate means of access of sea

water were found, nor any defect in the steamer which then appeared to be seaworthy.

The answer to be given to the first question will be fixed by determining upon whom rests the burden of proof to show the cause of the damage, when goods which have been received by a carrier in good order are by him delivered in a damaged condition.

As said in *Liverpool & Great Western S. S. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 437:

"By the settled law, in the absence of some valid agreement to the contrary, the owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. Molloy, Bk. 2, c. 2, § 2; Bac. Abr. *Carrier*, A; *Barclay* v. *Cuculla y Gana*, 3 Doug. 389; 2 Kent, Com. 598, 599; Story on Bailments, § 501; *The Niagara*, 21 How. 7, 23; *The Lady Pike*, 21 Wall. 1, 14."

And as observed in the same case:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld—such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against. . . ."

It was long since settled in *Clark* v. *Barnwell*, 12 How. 272, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But, as illustrated in the case of *The G. R. Booth*, 171 U. S. 450, proof merely of damage to cargo by sea water does not necessarily tend to establish that such dam-

age was caused by a peril or danger of the seas. In that case the facts were that the explosion of a case of detonators, which were part of a cargo, burst open the side of the ship below the water line, and, the sea water rapidly flowing in through the opening made by the explosion, injured the plaintiff's sugar. It was held that although the explosion and the inflow of the water were concurrent causes of the damage, yet "the explosion, and not the sea water, was the proximate cause of damage, and that this damage was not occasioned by the perils of the sea within the exceptions in the bill of lading." As well observed by counsel in the argument at bar, the efficient cause of the damage sustained by the rice on board the Folmina must be sought in those conditions or events which caused or permitted the entrance of sea water. It cannot in reason be said that sea water was the efficient, the proximate cause of the cargo damage, because no other cause for that damage has been disclosed. As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril. Of course, where goods are delivered in a damaged condition, plainly caused by breakage, rust or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But in a case like the one before us, where showing an injury by sea water does not in and of itself operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. For the distinction between the two see *The Henry B. Hyde*, 90 Fed. Rep. 114, 116; *The Lennox*, 90 Fed. Rep. 308, 309; *The Patria*, 132 Fed. Rep. 971, 972.

The inability of the court below to determine the cause of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. *The Edwin I. Morrison*, 153 U. S. 199, 212. And see further the following cases, applying the principle just stated, and holding that because the damage to cargo was shown to have been occasioned by sea water without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof. *The Sloga*, 10 Ben. 315; *The Compta*, 4 Sawyer, 375; *Bearse* v. *Ropes*, 1 Sprague, 331; *The Zone*, 2 Sprague, 19; *The Svend*, 1 Fed. Rep. 54; *The Centennial*, 7 Fed. Rep. 601; *The Lydian Monarch*, 23 Fed. Rep. 298; *The Queen*, 78 Fed. Rep. 155, 165, 168; affirmed, 94 Fed. Rep. 180, 196; *The Phoenicia*, 90 Fed. Rep. 116, 119; *S. C.*, 99 Fed. Rep. 1005; *Ins. Co.* v. *Easton & M. Transp. Co.*, 97 Fed. Rep. 653; *The Presque Isle*, 140 Fed. Rep. 202, 205.

So far as the second question is concerned, it does not propound a distinct issue of law, but in effect calls for a decision of the whole case, and therefore need not be answered. *Chicago, B. & Q. Ry.* v. *Williams*, 205 U. S. 444, 452, and cases cited.

The first question is answered No, and the second is not answered.